

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff, No: 1:20cr183-1/2/4/5/6

vs.

ADAM DEAN FOX,  
BARRY GORDON CROFT, JR.,  
KALEB JAMES FRANKS,  
DANIEL JOSEPH HARRIS and  
BRANDON MICHAEL-RAY CASERTA,

Defendants.

Before:

THE HONORABLE ROBERT J. JONKER  
U.S. DISTRICT Judge  
Grand Rapids, Michigan  
Tuesday, January 18, 2022  
Motion Proceedings

APPEARANCES:

MR. ANDREW BIRGE, U.S. ATTORNEY  
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On behalf of the Plaintiff;

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On behalf of Defendant Fox.

1 MR. JOSHUA ADAM BLANCHARD (Via Video)  
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7 On behalf of Defendant Croft, Jr.

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13 On behalf of Defendant Franks.

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20 MR. MICHAEL DARRAGH HILLS (Via Video)  
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25 On behalf of Defendant Caserta (Via Video)

REPORTED BY: MR. PAUL G. BRANDELL, CSR-4552, RPR, CRR

1 01/18/2022

2 (Proceedings, 11:00 a.m.)

3 LAW CLERK: The United States District Court for the  
4 Western District of Michigan is now in session. The Honorable  
5 Robert J. Jonker, chief judge, presiding.

6 THE COURT: Welcome everyone. We are here on the case  
7 of the United States against Fox and others, 1:20cr183. We  
8 have a number of motions that have been filed and fully briefed  
9 with a particular focus on the parties' competing motions on  
10 proposed hearsay or what the Government would consider hearsay,  
11 the Defense would consider admissible, on a number of issues,  
12 and some other related points in the evidentiary realm, and  
13 that's really what I want to focus on today.

14 We have spent about an hour or so trying to get the  
15 logistics lined up responding to COVID issues that have come up  
16 and then two problems with our video system. So I apologize to  
17 everybody for those delays. Why don't we start by getting  
18 appearances of the people in the courtroom. Then we'll  
19 identify the people on video and make sure they can hear. So  
20 let's start with the courtroom presence.

21 MR. KESSLER: Good morning, Your Honor. Nils Kessler  
22 and Jonathan Roth for the United States.

23 THE COURT: Okay. Thank you.

24 MR. GIBBONS: Good morning, Your Honor. Chris Gibbons  
25 on behalf of Adam Fox, seated to my right, and also present

1 with me today is my law partner, Karen Boer.

2 THE COURT: All right. Thank you.

3 MR. GRAHAM: Good morning, Your Honor. Scott Graham  
4 on behalf of Kaleb Franks, who is also present.

5 THE COURT: All right. Were they able to get the  
6 other monitor working or you have a separate one that is  
7 working?

8 MR. GRAHAM: We have a separate one that's working.

9 THE COURT: Okay. Back row?

10 MS. FREEMAN: Good afternoon, Your Honor. Melissa  
11 Freeman on behalf of Mr. Croft, who is seated next to me.

12 MS. KELLY: Good afternoon, Your Honor. Julia Kelly  
13 on behalf of Daniel Harris. He is present before the Court and  
14 in custody.

15 THE COURT: All right. Thanks. Let's go to the  
16 people that we have on by video my understanding is, and let me  
17 start with attorney Mike Hills. Are you able to hear me,  
18 Mr. Hills?

19 MR. HILLS: Thank you, Your Honor. I can.

20 THE COURT: Okay. We can only see you when you are  
21 speaking, which includes now, but you'll just have to make sure  
22 you let us know if for some reason you drop off, can't hear  
23 anymore any way you can. I think is somebody else in the  
24 courtroom on your behalf?

25 MR. HILLS: No. We were going to do that if

1 Mr. Caserta was there, I believe, for communication purposes,  
2 and we had that ready to go, but Mr. Caserta was not brought  
3 down to Court.

4 THE COURT: Okay. Fair enough. Let's do that second.  
5 Mr. Caserta, who is still at Newaygo because of a COVID  
6 exposure, are you able to hear us?

7 DEFENDANT CASERTA: Yes, Your Honor. I can hear you.  
8 I was not exposed to COVID though. I just didn't have  
9 (inaudible) for COVID-19.

10 THE COURT: Fair enough. My understanding was that  
11 because you had had a conversation with Mr. Hills, your  
12 attorney, who did come back with a positive test, that the jail  
13 was unwilling to bring you down. Is that your understanding or  
14 was there some other barrier from your perspective?

15 MR. HILLS: Can I chime in, Your Honor, because I have  
16 not been able to communicate with my client prior after I  
17 tested positive? I was up there on Sunday. Spent three  
18 and-a-half hours with my client after I tested negative, and  
19 then yesterday I tested positive in the afternoon and in a  
20 flurry of communication. So my client is basically in the dark  
21 to this I think.

22 THE COURT: Okay. All right. Mr. Caserta, were you  
23 able to hear your lawyer speaking a moment ago?

24 DEFENDANT CASERTA: Yes, Your Honor. I heard  
25 everything.

1 THE COURT: Okay. Thank you. And then I think we  
2 also have Mr. Blanchard, whose colleague, Ms. Freeman, is here  
3 in Court on behalf of Mr. Croft, but can you hear us all right,  
4 Mr. Blanchard?

5 MR. BLANCHARD: Yes. I can hear you, Your Honor.

6 THE COURT: Good morning. Feeling all right?

7 MR. BLANCHARD: Yeah. I think the vaccine is doing  
8 its job.

9 THE COURT: All right. Good. Is there anybody else  
10 on video that we haven't identified that needs to be  
11 identified? Okay. So I think we have either in the courtroom  
12 all of the Defendants or in Mr. Caserta's case his video  
13 presence from Newaygo, and we have counsel for each of them  
14 either here in Court or on video or in some cases both, and I  
15 appreciate everybody's bearing with us to try to get the  
16 logistics set up. When we have this many people involved and  
17 this much briefing it's hard to just put it over to another  
18 day, and I do think that in this case the parties have done a  
19 lot of briefing as well.

20 The point that I would like to get to today is to hear  
21 the parties' summary on some key issues, some key evidentiary  
22 issues. I'll make a couple preliminary comments, and then the  
23 main issues I want to hear about are the parties' positions on  
24 the Defendants' own statements, which again, the Government  
25 says are largely hearsay and excludable, or from the Defense

1 point of view admissible either as a non-hearsay purpose or on  
2 some other grounds.

3 The other issue, a second related issue, is the  
4 statements of the agents, and the third, closely related, the  
5 statements of the confidential human sources that were made out  
6 of court and that the Defense together has summarized at least  
7 what they know so far on a spreadsheet attached to their  
8 motion. I certainly have a good feeling from the briefing on  
9 all sides of where the parties stand on that, but I want to  
10 give you a chance to highlight that, and then we'll talk as  
11 well if there is time about predisposition evidence the  
12 Government wants to admit under 404(b) if entrapment is in the  
13 case, and the Defense desire to submit evidence regarding at  
14 least some of the agents and bad conduct that they would like  
15 to bring in front of the jury to attack the integrity of the  
16 investigation. There may be other issues that come up along  
17 the way as well.

18 The other thing that nobody has really briefed that I  
19 would like to hear perspectives on today, and it's really  
20 interwoven with the evidentiary issues, is when and how the  
21 parties envision the Court's ruling on whether entrapment is in  
22 the case. I know the Defense has pending motions to dismiss as  
23 a matter of law under Rule 12. We are closing it to briefing  
24 on that, but what I've seen so far I'd have to say those are  
25 stretch positions on the Defense part from my perspective.

1 I've looked at all the cases they have cited. Not a single one  
2 involved a dismissal as a matter of law under Rule 12. There  
3 were some statements about judgment as a matter of law on  
4 entrapment, but Rule 12 as a mechanism, although perhaps not  
5 automatically disqualifying, is a pretty hefty lift. So  
6 assuming that motion doesn't get granted, when does the call  
7 get made from the perspective of the parties?

8 On the one hand we could simply assume it's in.  
9 Everybody starts at ground zero with opening statements and  
10 evidence on all of the issues of inducement and predisposition,  
11 and maybe that's the way to go. That's certainly the way the  
12 parties have briefed things, but there is, unlike most  
13 situations, at least some burden of production on the Defense  
14 part to put entrapment at play, much as a self-defense  
15 instruction would apply in analogous circumstances. And  
16 depending on what, if any, of the spreadsheet items come in, we  
17 may not know for sure what the Defense has by way of evidence  
18 to meet that burden until we see the Defense case, and in  
19 particular whether we see any Defendant decide to take the  
20 stand or whether the Defendants decide to stand on their right  
21 not to testify.

22 So no predisposition myself about what to do with  
23 that. I think there are good reasons either to assume it's in  
24 the case from the start, but there may also be reasons to  
25 delay. In particular it seems to me that much of the evidence



1 that's been identified on the spreadsheet by the Defense, if  
2 it's admissible, could be bearing on not simply entrapment, the  
3 inducement issue of entrapment, but also on whether there was a  
4 conspiracy, and if so, whether this individual or that  
5 individual joined. So there is more overlap there.

6 In contrast, evidence of predisposition, particularly  
7 things like what the Government wants to put in under 404(b),  
8 there is no other purpose other than entrapment, and the  
9 predisposition prong in particular for that.

10 So if we start at ground zero the Government is going  
11 to get to bring that in in its case in chief to the extent it  
12 is otherwise allowable in my view. If not, it may never come  
13 in. So that's a question and a decision point that I have to  
14 make and would like the parties' perspectives on. And since I  
15 don't have any perspective on that yet, that's really where I'd  
16 like to start and then get into the more knitty gritty on the  
17 evidentiary issues. So let me start with the Government's  
18 position on that. And I know I am jumping you with it because  
19 nobody had a chance to think about it. Let me start with  
20 either Mr. Kessler or Mr. Roth, whoever is speaking for the  
21 Defendant.

22 MR. KESSLER: Yes, Your Honor. How would you --

23 THE COURT: So stay close to a microphone, and that's  
24 the key thing, and so if you want to pull that microphone on  
25 the desk right close to you, just stay seated, that's fine. If

1       you can't do that because you are so used to standing, just  
2       come up to the podium. Either way. And make sure you speak as  
3       clearly as possible. I tend to mumble if I have a mask on so  
4       when I am speaking I don't have myself masked. I'll leave it  
5       up to you how to decide.

6               MR. KESSLER: If you can understand me better I'll  
7       take it off.

8               THE COURT: Thank you. And I know Mr. Brandell will  
9       have an easier time. Go ahead.

10              MR. KESSLER: All right. Thank you, Your Honor.

11              I think we would probably -- the Government would go  
12       with option No. 2, which would be not to assume that it all  
13       comes in at ground zero. I think the Defense, as the Court has  
14       pointed out, it is an affirmative defense or at least they have  
15       the burden of initial production to show that there was some  
16       inducement. I think they should have to do that first. And I  
17       agree with the Court. It actually intertwines with one of the  
18       motions we are talking about today, which is the 404(b) motion.  
19       And I agree with the Defense to some extent that if this were  
20       not an entrapment case some of the evidence that we are  
21       proposing to get in would be inadmissible character evidence  
22       normally under 404(b), but once they raise an entrapment  
23       defense character becomes the critical issues. That's the  
24       Nelson case. It's the No. 1 issue that we have to prove. And  
25       that would allow us to put the predisposition evidence in right

1 from the beginning. I don't think that's helpful to them  
2 either to be honest with you. So I do think it's better that  
3 nobody mention it in the opening statements. They have the  
4 burden of the initial production, and if the Court determines  
5 at some point that there has been enough of a showing, then  
6 we'll start putting in our predisposition evidence, Your Honor.

7 THE COURT: All right. Let me go to the Defense side.  
8 I don't know what order people have agreed on, if any, so I am  
9 just going to go in the Defendant order unless there is a  
10 reason to go otherwise, starting with Mr. Gibbons.

11 MR. GIBBONS: Thank you, Your Honor.

12 With respect to entrapment, the Defense has been  
13 raised in pleadings to date. Recent authority in the Sixth  
14 Circuit -- and I ran across this last night. I did not bring  
15 the case. I don't have the cite, but I'd be happy to provide  
16 it to the Court. There is an instance recently here within the  
17 circuit where the trial court did find that entrapment had been  
18 sufficiently raised in pretrial matters. That the trial  
19 proceeded with a pretrial ruling that entrapment would be  
20 allowed to be introduced as a Defense at trial and the  
21 instruction would be given so that the parties did proceed with  
22 that foreknowledge.

23 THE COURT: Do you have the name of the case?

24 MR. GIBBONS: I don't, Your Honor.

25 THE COURT: Okay. Go ahead.

1 MR. GIBBONS: It is ultimately a question for the jury  
2 whether or not entrapment is successful in the case as a  
3 defense. So I would say that.

4 We think -- and I would invite the Court to maybe  
5 allow us to brief the issue. I do have that case that I can't  
6 recall the name of off the top of my head but I ran into last  
7 night. I was preparing for the out-of-court statements matter,  
8 so I kind of put that to the side. I do think that there  
9 are -- is enough question with respect to entrapment on the  
10 record as it exists. I think we've made that showing already,  
11 and we would be more than happy to provide the Court with more  
12 specificity.

13 THE COURT: All right. What about the point that  
14 Mr. Kessler raises and I guess that I suggest in my own  
15 questions? Do you really want it to be in from the start? If  
16 you get an evidentiary bridge to whatever is otherwise  
17 admissible -- which I know we haven't talked about yet. Not  
18 just because inducement is in the case but because the  
19 Government also has to prove a conspiracy and that these  
20 individuals joined, why do you want to invite predisposition  
21 from the opening statement?

22 MR. GIBBONS: The defense in this case is, one, that  
23 an agreement to kidnap Governor Whitmer was not reached between  
24 the Defendants. That's the first planning of the defense.  
25 Alternatively, if the jury should decide that amongst

1 everything that is presented that it appears that an agreement  
2 may have been made, then our backstop against that is  
3 entrapment, Your Honor.

4 THE COURT: All right. Yeah. Thank you.

5 MR. GIBBONS: So I mean --

6 THE COURT: Either way you would like it to come in?

7 MR. GIBBONS: If you are going to bake the cake you  
8 got to use flower, so predisposition I think necessarily comes  
9 in whether we like it or not because I think that's just the  
10 nature of our defense.

11 THE COURT: All right. Thank you. Let me go to  
12 Mr. Blanchard. I know you are on. Hopefully you are still on  
13 the video. Are you able to hear, and if so, can we get your  
14 perspective? Go ahead, Mr. Blanchard.

15 MR. BLANCHARD: So you know, I guess my preference is  
16 to have a ruling earlier so we know what the ground rules are.  
17 I sort of think the Court can address this like in the pleading  
18 and either -- and keep it on the Defendants of what we expect  
19 to show or we can have a hearing outside of the presence of the  
20 jury to see if we can convince you of what we are entitled to  
21 in instruction on entrapment. That may be a clear way to do it  
22 so we know what the ground rules are going in.

23 It's a little bit tough when you have such a  
24 substantial defense to hide that from the jury in opening, and  
25 I am mostly concerned about what the trial looks like if the

1 Government is allowed to put on predisposition evidence but  
2 that all comes in at rebuttal. I don't know how fair it is to  
3 make that in front of the jury when the Government comes in and  
4 trots out here is some stuff these guys did 25 years ago. They  
5 are bad guys. Convict them. And I understand the argument  
6 would be more nuanced, but that may be how it feels to a jury,  
7 and so I would prefer to have it earlier at least and maybe the  
8 Court can make that ruling in the course of trial --

9 THE COURT: All right.

10 MR. BLANCHARD: -- in the course of hearing this case,  
11 but I am sort of thinking of, like, Enright --

12 THE COURT: I think he said something like Enright in  
13 the co-conspirator context.

14 MR. BLANCHARD: Correct.

15 THE COURT: All right. Thank you. The audio was  
16 breaking up for us a bit, Mr. Blanchard. I think we were able  
17 to hear you, but if you have an ability to use the headphones  
18 sometimes that helps, just for your information.

19 But let's go onto Mr. Graham then.

20 MR. GRAHAM: Your Honor, it seems to me that the  
21 parties would be in a better position to address the questions  
22 you have posed after hearing your ruling on the motion to admit  
23 the statements. My gut would be to receive the ruling and then  
24 brief for the Court, you know, a specific position regarding  
25 that, because to be honest, I am just not certain right now.

1 THE COURT: All right. The briefing that at least I  
2 read and understood of course identifies a whole bunch of  
3 statements that the Defense wants to get in on a number of  
4 grounds, but at least my reading of it was that maybe not  
5 everyone but many of them, the Defense position would be it's  
6 not just relevant to inducement but also to the first two  
7 elements. Namely, is there a conspiracy at all, and if so,  
8 did -- did that or that Defendant join?

9 MR. GRAHAM: I agree.

10 THE COURT: I know you don't want to commit, and maybe  
11 you can't, but if that's the case, and anything that's  
12 otherwise admissible comes in, why would you want to invite  
13 predisposition at the beginning of the case before you know for  
14 sure if entrapment is in the case?

15 MR. GRAHAM: Excuse me. It seems to me that they are  
16 so intertwined that it's going to be unavoidable not to have  
17 all of the evidence come in. That's at least my gut reaction.

18 THE COURT: Okay.

19 MR. GRAHAM: So whether I would want it or not I just  
20 don't see how we're going to be able to cross examine  
21 Government witnesses, talk about everything that happened,  
22 without kind of opening the door to both.

23 THE COURT: All right. So if you are going to bake  
24 the cake you need flower, to quote one of your co-counsel?

25 MR. GRAHAM: Yes.

1 THE COURT: Okay. Ms. Kelly?

2 MS. KELLY: Thank you, Your Honor.

3 And in listening to the Court's most recent  
4 comments --

5 THE COURT: You know what, that microphone isn't hot  
6 for whatever reason.

7 MS. KELLY: Is that better, Your Honor?

8 THE COURT: As long as Mr. Brandell can hear you. I  
9 can hear you, so go ahead.

10 MS. KELLY: Okay. In thinking about the Court's most  
11 recent statements, certainly from my perspective would not want  
12 predisposition evidence to come in. I have filed a brief on  
13 that issue from the get-go. I do believe, as I've stated in my  
14 brief, I don't believe that evidence should come in anyway, but  
15 the big if in the question is whether or not entrapment is used  
16 as a Defense for Mr. Harris. I would appreciate having that  
17 answer sooner than later from this Court, knowing if the Court  
18 is going to allow that defense from the get-go. And I  
19 certainly would also appreciate knowing the ruling on the  
20 out-of-court statements and then having that opportunity to  
21 brief it for this Court.

22 THE COURT: All right. And Mr. Hills?

23 MR. HILLS: Frankly, I'd rather not have it come in at  
24 the beginning, but the problem is, you know, from the beginning  
25 the defense of the entrapment is going to proceed. So then we



1       lose whatever momentum we have by not opening with it. So that  
2       causes a problem for me anyway. Yeah.

3               THE COURT: All right.

4               MR. HILLS: I'd like to know before our opening, and I  
5       think, Your Honor, it seems to me it's unavoidable with the  
6       entrapment statements and the evidence coming in, but I sort of  
7       would agree with Mr. Gibbons that we kind of need to know that  
8       issue before going in the opening.

9               THE COURT: All right. Thank you. And you have the  
10      same issue sound wise that Mr. Blanchard had. We were able --  
11      at least I think I was able to understand you but with some  
12      difficulty. So if you have a headphone you might try it. If  
13      not, we'll just do the best we can. Thank you.

14              All right. Let's go to the issues that the parties  
15      have briefed and that was really, I think, the launching point  
16      for the hearing that we set up some time ago. The Government,  
17      of course, filed its motion to exclude what it talked about as  
18      hearsay, the statements of the individual Defendants, and  
19      that's really what I want to start with on the chart. Not  
20      going line by line. I don't think we have time to do that.  
21      Making sure I understand the Defense position, first of all,  
22      on, you know, higher level theories, and I appreciate the  
23      briefing the parties did on that.

24              I'll give you my incoming reactions after reading the  
25      briefing. And now talking about the statements of the

1 Defendants. You know, the rule of completeness is something we  
2 confront pretty routinely in lots of cases, and I don't really  
3 see a rule of completeness basis that would be a basis for  
4 admitting many, if any, of the Defendants' own statements.

5 This state of mind exception is something that isn't  
6 as typically briefed, but I think at least in my view after  
7 reading the spreadsheet a couple times, relatively few of the  
8 Defendants' own statements would even arguably fall in that  
9 bucket from my perspective. I don't think you can stretch  
10 state of mind to be broad enough to include statements of  
11 preference, for example, or statements where the relevance of  
12 what was said still depends on the underlying truthfulness or  
13 context, and a lot of it seems to me falls within that kind of  
14 a bucket.

15 The other related state of mind issue that comes up in  
16 at least when I try to do the analysis is timing. It's one  
17 thing to have a statement about method or means, the ones that  
18 come up about for a snatch and grab or something like that, but  
19 I don't think that was one of the Defendants' own statements.  
20 I think that was one of the other unindicted people, but there  
21 were similar statements attributed to one or more of these  
22 Defendants.

23 It's not so much, I think, within the state of mind  
24 exception early in the process. It's more that state of mind  
25 when they are driving out on a reconnaissance or when they are

1 driving to what they thought was a meeting with Red, and  
2 that's, I think, because state of mind has to be tightly tied  
3 to the specific expression of intent or motive at the time, and  
4 I don't see a lot on that chart that fits comfortably within  
5 those ranges.

6 So my inclination is to think that most of those  
7 statements are not going to come in as standalone statements.  
8 Some of them might come in if a Defendant chooses to take the  
9 stand. There is impeachment or attack by the Government that  
10 suggests they are making things up after the fact, and the  
11 Defense wants to rehabilitate with an earlier statement that's  
12 consistent, but as a matter of substantive evidence along the  
13 way relatively few that fit the pattern in my mind.

14 So that's my ingoing or incoming point of view. I  
15 know everybody signed the brief. I don't know if you have an  
16 order. Again, I would go in the order of the Defendants as  
17 they are named unless there is a reason to do otherwise, and  
18 we'll start with Mr. Gibbons.

19 MR. GIBBONS: Thank you, Your Honor.

20 As the Court has indicated, there have been several  
21 filings made with respect to the matters of out-of-court  
22 statements, so I'll give you an overview of the things that --  
23 from Mr. Fox's perspective that we're hopeful the Court agrees  
24 with us.

25 As the Court has indicated, many of the statements

1 contained in the chart are not offered for the truth of the  
2 matter asserted and therefore they would not qualify as hearsay  
3 so I think those statements -- there are a fair number of those  
4 indicated.

5 THE COURT: Give me an example so that we can talk  
6 concretely about something.

7 MR. GIBBONS: There was a reference in the briefing to  
8 Ty Garbin using a euphemism with respect to Adam Fox calling  
9 him Captain Autism.

10 THE COURT: Right. But I mean, I don't even  
11 understand the relevance of that unless it's tied to a broader  
12 factual claim that none of us were willing to follow Fox  
13 because he was a nut or an autistic operator, and that's part  
14 of the problem when I see a statement like that. To me there  
15 is not much relevance unless it's tied to other statements  
16 fundamentally underlying the truth of that statement that, in  
17 fact, Mr. Fox was so autistic that he wasn't going to be able  
18 to convince anybody to join in his scheme, if that's what it  
19 was. And you know, if a Defendant takes the stand and says  
20 that subject to cross, that's one thing. But just as a  
21 standalone statement I don't see how you get that in in a way  
22 that creates much relevance without the underlying truth of the  
23 factual context.

24 MR. GIBBONS: From my perspective, the circumstance in  
25 which that statement was uttered involves the undercover CHS

1 Dan in a truck with Mr. Garbin. The whole purpose is to prompt  
2 a phone call between Mr. Garbin and Mr. Fox to put them  
3 together in this attempt to build the conspiracy to kidnap  
4 Governor Whitmer. I think in the statement Mr. Garbin  
5 expresses frustration with Mr. Fox because they are unable to  
6 complete a simple phone call with Mr. Fox that doesn't take 10  
7 minutes to get it straightened out and clarified.

8 Ty Garbin is -- has taken the position that he, in  
9 fact, as the Government alleges, Mr. Fox had a plan to kidnap  
10 the governor in a military style assault that would receive  
11 fairly high level performance, skills, knowledge and planning.  
12 It seems to me that Mr. Garbin's statement when he is  
13 disparaging Mr. Fox is counter to the position he has taken  
14 with respect to his plea and the Government's case. I think  
15 that is relevant. My client doesn't have autism. Doesn't  
16 matter that he has autism or he doesn't have autism for the  
17 purposes of this exercise. What is important about this  
18 exercise is it shows Mr. Garbin has little or no respect for  
19 Mr. Fox. Mr. Fox is allegedly his leader, and this seems to me  
20 people don't follow people they don't respect.

21 THE COURT: So pick a statement from somebody who is  
22 actually on trial, not somebody who is presumably going to  
23 testify and be subject to cross examination including on a  
24 statement like that.

25 MR. GIBBONS: Let me get my chart out, Your Honor.

1           THE COURT: That's really what we are talking about  
2 really, and there is so much about this case that gets, you  
3 know, bent through the prism of high publicity and an alleged  
4 target of the kidnapping plot that's high profile and a  
5 politician, but the issues aren't all that different than we  
6 confront in most conspiracy cases, and every Defendant wants to  
7 put in their, you know, exculpatory statements, and the general  
8 reaction is, you know, if you want to put that in, you take the  
9 stand and testify. You don't get to smuggle it in otherwise.

10           MR. GIBBONS: I understand that, Your Honor. I do  
11 think, however, though, when the statements are not being  
12 offered for the truth of the matter asserted and they are being  
13 offered for --

14           THE COURT: Give me an example of that, a statement  
15 from a Defendant.

16           MR. GIBBONS: An example could be, Your Honor, my  
17 client, Adam Fox, made a statement about alternate plans and  
18 saying he didn't want to pursue necessarily this kidnapping  
19 that's being touted by the Government agent.

20           THE COURT: But why does that have relevance -- let me  
21 finish. Why does it have relevance unless it's truthful that  
22 he didn't want to do it?

23           MR. GIBBONS: Because it goes to predisposition, and  
24 it gets into the entrapment Defense, which is whose idea was  
25 it? Did the Defendant -- was he reluctant? Was he overcome by

1 Government persuasion, et cetera?

2 THE COURT: But all of that depends on the truth of  
3 that statement, doesn't it? I mean, he could have been making  
4 the statement for play acting purposes. He could have been  
5 making the statement just because he didn't like the  
6 particulars of a particular plan. It seems to me truth is what  
7 gives you the weight of the argument that followed, and if it's  
8 truth dependent then I don't see how you get it in unless he  
9 takes the stand and subjects himself to cross.

10 MR. GIBBONS: I don't necessarily know that offering  
11 it for the truth of the matter asserted is a default because it  
12 can be offered that way, but if it is offered for another  
13 legitimate purpose I think it can be saved, Your Honor.

14 THE COURT: All right.

15 MR. GIBBONS: Like, in this instance did Adam Fox  
16 express reluctance? That's a question that is contained within  
17 the parameters of the predisposition jury instruction. So I  
18 think it does bear relevance. Is it true? Adam Fox is going  
19 to say it's true. The Government is going to say it's false.  
20 He thought he was infiltrated by the feds and is just saying it  
21 to look good.

22 So ultimately what I think it comes down to is this  
23 something that Mr. Fox should be able to offer the jury in his  
24 defense, allow the jury to do its job, which is to weigh the  
25 credibility of the statement? We are not necessarily offering

1       it for the truth of the matter asserted. We are offering it  
2       because it was said and it is relevant to the standards that  
3       the jury is going to put -- be put to with respect to the  
4       entrapment instruction.

5               THE COURT: All right. Anything else that you want to  
6       address on the aspect of the motion involving prior Defendants'  
7       statements, that's Defendants on trial?

8               MR. GIBBONS: The only other thought on it, Your  
9       Honor, and it's not necessarily raised in the pretrial filings,  
10      is the idea that some of these statements might require some  
11      foundation before a ruling is made in terms of an excited  
12      utterance, present sense impression, where they were, what time  
13      in the grand scheme of things, when was the statement made in  
14      time as the Court has already indicated? So when I was  
15      breaking down what I thought I would present to the Court today  
16      I looked at the Defendants' statements as being more  
17      circumstantial in terms of a question, fact specific, a little  
18      more fact dependent. On the other side of the equation with  
19      respect to anything said by Government agents be it CHSs,  
20      special agents --

21              THE COURT: We'll talk about that separately.

22              MR. GIBBONS: -- I believe those to be more  
23      categorical.

24              THE COURT: Okay. Fair enough. And I don't mean to  
25      cut you out, Ms. Freeman. You are here and if you are speaking



1 on these issues of course it's fine, but otherwise I'd go to  
2 Mr. Blanchard next for anything you want to add on the question  
3 regarding proffered statements from the Defendants themselves.

4 MR. BLANCHARD: Yes, Your Honor. I think one example,  
5 if you look on the chart, you know, there is a discussion there  
6 where I think it comes in as an existent plan that --

7 THE COURT: Let me ask you to go -- let me ask you to  
8 go really slow because pieces of your words are not coming  
9 through. So we'll listen. We'll just try to go  
10 selfconsciously painfully slow and we'll hopefully be able to  
11 hear you better.

12 MR. BLANCHARD: I will try to do that. I note that I  
13 can hear Mr. Hills fine so I think it may be the audio  
14 connection in the courtroom.

15 THE COURT: Okay.

16 MR. BLANCHARD: In any case, on number, I believe it  
17 was 6 on the chart, there is a conversation that Mr. Croft is a  
18 party to.

19 THE COURT: But that's not his statement. Let me cut  
20 you off. I want not conversations that somebody was party to  
21 but the actual statements of the Defendant as examples. That's  
22 what I want to talk about now.

23 MR. BLANCHARD: Sure. So No. 10 I think is a  
24 statement of Mr. Croft talking about his plan related to this  
25 group. When prompted by a CHS he states its then existing plan

1 is to rebuild and restore the country to what was intended.  
2 And I think, you know, that's not much different if you were to  
3 ask someone where you are headed? I am on my way to Utah.  
4 Leaving today for Utah. I think that would be an existing  
5 condition.

6 THE COURT: Stay slow. Stay slow. Go ahead.

7 MR. BLANCHARD: Sorry. Slow is not my strong point.

8 So I think that, you know, that's the example of the  
9 statement made by Mr. Croft that shows his then existing mental  
10 condition that is inconsistent with the Government's theory.  
11 And I think -- I understand the Court's view on rule of  
12 completeness. It is very narrow. In a case like this I think  
13 this could also come in under rule of completeness because we  
14 have -- the Government intends to introduce other statements  
15 that they are going to argue show he had a different than  
16 existing intent, and the jury ought to be able to see all of  
17 the evidence on Mr. Croft's intent.

18 THE COURT: Okay.

19 MR. BLANCHARD: So I think most of my issue as to  
20 Mr. Croft where I don't believe are part of the admission or  
21 otherwise, other people, I think most of the statements as to  
22 Mr. Croft were that he is listing mental condition state of  
23 mind type basis to come in.

24 THE COURT: All right. Thank you.

25 Mr. Graham?

1 MR. GRAHAM: Your Honor, the example I would turn to  
2 would be at page 17 of the chart, entries 68, 69, 70.

3 THE COURT: What's the line item number?

4 MR. GRAHAM: It is 68.

5 THE COURT: Thank you.

6 MR. GRAHAM: 69 and 70.

7 THE COURT: Okay.

8 MR. GRAHAM: I don't want to cut in front of  
9 Ms. Kelly, but the audio shows that there is a discussion going  
10 on, and during the discussion Mr. Harris says things like, they  
11 are shutting down discussion of kidnapping. We shut it down  
12 very quickly. There is a question about kidnapping. He says  
13 no, shut up, we are not Frank, meaning Frank Butler. And then  
14 most specifically item 70, during the discussion with where  
15 somebody is apparently talking about kidnapping, Mr. Harris  
16 says, no snatch and grab. I swear to God. I'll leave out the  
17 expletive.

18 It seems to me those -- and what I would suggest is  
19 under Rule 803(1)(2)(3) that statement would be admissible to  
20 show his state of mind and his present sense impression of what  
21 was said. So that would be the example that I would use as  
22 well as anything else that might be said during a discussion  
23 when a Defendant or someone else says something like, no, I  
24 don't want to do what has been suggested. I think that  
25 evidence is relevant both as it relates to the establishment of

1 conspiracy and the -- and the question of predisposition as  
2 well as other statements that might be a speaker might speak  
3 negatively about a plan, and then others like Mr. Franks and  
4 others would say that they agreed with those statements. So  
5 statements occurring -- I guess the bottom line for me,  
6 statements occurring during a discussion about kidnapping, for  
7 example, where someone says immediately, no, I am not involved  
8 or no snatch and grab, I swear to God, 803(1)(2)(3) are the  
9 basis for my position there as well as other statements.

10 THE COURT: All right. So if you read the state of  
11 mind exception that broadly, you know, how do you draw the  
12 limits? I guess what's troubling to me on a statement like  
13 that, and I think I summarized it in my opening comments, it  
14 seems to me more like a statement of preference. You know, it  
15 would be a statement of intent to say, you know, I want to go  
16 for ice cream and then somebody, oh, I hate chocolate. And if  
17 we are talking about a particular debate about means and  
18 methods, I am not sure I understand how that fits within the  
19 803 exception without basically allowing a lot of statements,  
20 not just in a case like this but in other cases, to come in  
21 that a Defendant would offer as exculpatory without the ability  
22 of the other side to cross examine.

23 MR. GRAHAM: And Your Honor, my response would be  
24 this, and maybe we need a more detailed transcript, because in  
25 light of your comment, it's a matter -- it's not a matter of

1 preference in my opinion if someone says we need to kidnap her.  
2 We need to perform a snatch and grab, and then they are  
3 immediately confronted with a specific statement saying, no, no  
4 way, not talking about some other -- something else that might  
5 be done, some other action or activity. If they specifically  
6 confront someone saying what you just suggested is -- I won't  
7 do it, no snatch and grab, or something comparable, then my  
8 response is I don't see that as a statement of preference. I  
9 see that as a statement, a state of mind saying, no, you say  
10 this and I say no.

11 THE COURT: Okay. And the other aspect of the state  
12 of mind exception that I was focusing on in my comments was  
13 timing. It's one thing to have that early in the process.  
14 It's another thing to have it later in the process at the time  
15 of the evening reconnaissance mission, for example, or the time  
16 they go to meet Red and get arrested instead. When you are  
17 talking about relevance, I am not sure that the earlier  
18 statements are relevant unless you have so much more context  
19 that you basically are putting in all kinds of hearsay to  
20 explain a statement that would normally be a hearsay  
21 exculpatory statement. I mean, I don't have all of the  
22 transcripts. As you say, you did a nice job trying to  
23 summarize the context, but without the context, relevance is  
24 pretty hard to understand, and if we have to have all the  
25 context to demonstrate the relevance it seems to me we are

1 going to have trial by hearsay instead of trial by sworn  
2 witnesses.

3 MR. GRAHAM: Your Honor, my response to that would be  
4 that if we did have the full transcript it might be a simple  
5 half page exchange. Someone says, we should kidnap, and then  
6 one of the Defendants says, no. I don't know that we need a  
7 whole lot of extra information. I understand the point that  
8 you are making, but I think that may be one of the things that  
9 the Court needs to evaluate is that very point of looking at  
10 exactly what the exchange was and what the response was to see  
11 if it's too large in terms of quantity to make sense or if it's  
12 just a simple bang bang showing the state of mind of a  
13 Defendant. I just am not in a spot on these statements to do  
14 that right now.

15 THE COURT: All right. Fair enough.

16 Ms. Kelly?

17 MS. KELLY: Thank you, Your Honor.

18 And Mr. Graham did steal a lot of my statements that I  
19 was going to talk about just to give the Court some examples.  
20 I do think the statements as identified by Mr. Graham, 67  
21 through 70, of my client were present sense impression. I see  
22 an example to differentiate for the Court in 65 also a  
23 statement by Mr. Harris which I think may fall into that  
24 preference category. Mr. Harris is talking about, hey, let's  
25 go see if we can go take over a CNN tower, when others may be

1 talking about a kidnapping plan. That may be preference. I  
2 see those as different for 68, 69, 70, which he is specifically  
3 confronted with a request about a snatch and grab, about a  
4 kidnapping, and he continues to say no.

5 As the Court may have seen in other briefings that I  
6 have filed, Mr. Harris was not invited on the Government  
7 ride-along on September the 12th, so he had no opportunity to  
8 talk about it that day. He was not told about this Government  
9 sponsored ride-along. So what we have are the times that he  
10 was confronted or the times that he was proposed an idea and he  
11 immediately shoots it down. He doesn't have time to recollect  
12 or think about it, and it's continuous. In the Government's  
13 response to our motion they talk about, well, he is just saying  
14 that because he was skeptical that the plan was going to work  
15 or that he was afraid of infiltration of a law enforcement  
16 officer and that's why he is making these statements and they  
17 are not reliable in that fashion. There is zero evidence that  
18 Mr. Harris was changing his tune or changing a reaction to the  
19 idea of kidnapping, and those statements as identified by  
20 Mr. Graham show that that's his present sense impression each  
21 and every time that he is confronted with this idea.

22 And again, as far as the timing, and I know the Court  
23 has brought up the reconnaissance and then the driving down on  
24 October the 7th to meet with Red. What we provided to this  
25 Court are statements of what Mr. Harris and others were told of

1 the purpose of going to meet Red was for tactical gear, and  
2 that's been briefed. It had nothing to do with explosives. It  
3 was to get tactical gear. So of course there is not going to  
4 be any conversations about a proposed kidnapping or conspiracy  
5 to kidnap during that car ride because they think they are  
6 going to get tactical gear and then they are going to BW3s  
7 afterwards for beer and chicken wings.

8 So the timing portion I understand, but if Mr. Harris  
9 is not involved in either of those timings, all we can look at  
10 is his present sense impression as the summer progresses  
11 starting from May the 14th when he is on the chat group saying  
12 hopefully we never have to point our guns at any other American  
13 because then our country is over, and that it's continuing  
14 through the summer, and each time that should fall under the  
15 category for present sense impression, but I understand the  
16 Court's position about the difference between preference. I  
17 see these statements in particular as a reaction to a statement  
18 without any kind of changing that idea.

19 THE COURT: Okay. Thank you.

20 Mr. Hills, I am going to ask you to use the same slow  
21 pacing that Mr. Blanchard did and hopefully we will be able to  
22 understand you and anything you'd like to add.

23 MR. HILLS: Okay. Yes. If I am going too fast just  
24 let me know.

25 I would pick up on what the Court indicated that --



1 the timing of this. I would note that Mr. Caserta did not go  
2 on the ride-along on September 12th that the Court mentioned.  
3 There was another one on August 29th that my client did not go  
4 along on. The October 7th, when CHS Dan picked everyone up and  
5 they were arrested, my client wasn't there either.

6 The statement that I would point the Court to, and  
7 there aren't many in this, is item No. 26 on page 10 of our  
8 chart. The misstatement of my client comes on August 23rd at  
9 the Lake Orion meeting is that it is of the subject -- I  
10 believe it was in the complaint and it's definitely in the  
11 superseding indictment I believe on item No. 7 in their  
12 superseding indictment, and my client, I don't think you can --  
13 putting this in context, there are several statements right  
14 before and after my client's statement by CHS Dan, and CHS Dan  
15 is vouching -- I know the Court doesn't want me to talk  
16 necessarily about the CHSs right now or the agents, but that's  
17 the context of this is right before it CHS Dan is vouching for  
18 CHS Steve, and then he comes down and he talks about Adam Fox's  
19 plan, which Adam Fox is not at this meeting. But he says, Adam  
20 Fox, so he is all about fucking killing her, right? That's why  
21 we want to go on a recon. Recon this shit. And my client  
22 pushes right back on that statement. Going right now. If we  
23 went, like, next week I don't know if that would be a good  
24 idea. I think we should wait a little bit because they, the  
25 Government, are going to initiate massive aggression.

1                   So my client is pushing back immediately on this. And  
2 CHS Dan comes right back, we are doing this stuff now. So  
3 that's the context of my client pushing back on it, and I know  
4 that there are a couple other statements that are made in this  
5 chart and it's the same thing of my client pushing back.

6                   THE COURT: So why isn't that a statement of  
7 preference? I am not sure I see the, you know, mental intent  
8 unless you stretch mental intent to be, you know, anything that  
9 is exculpatory. I have the mental intent of being exculpated,  
10 but it just seems like he is debating whether it was a good  
11 tactic or not, and I am not sure that fits within a state of  
12 mind exception.

13                  MR. HILLS: Well, I guess I would have to disagree  
14 with the Court. I think that's an 803 -- probably more an  
15 803(3) as opposed to a present sense impression, but I would  
16 think -- I would also argue present sense impression that, you  
17 know, going and killing her right now is a dramatic event and  
18 also under the then existing mental, emotional and physical  
19 condition I believe is intent. It's his intent not to go along  
20 with CHS Dan's plan.

21                  THE COURT: All right.

22                  MR. HILLS: I am sorry. Are you picking me up?

23                  THE COURT: I can. Slower is better.

24                  MR. HILLS: Okay. All right. Sorry.

25                  THE COURT: All right. Anything else on that?

1 MR. HILLS: Not of my client's statements, Your Honor.

2 THE COURT: Okay. Let me go to Mr. Kessler and just  
3 get the Government's overall position on admitting the  
4 statements of the individual Defendants.

5 MR. KESSLER: Yes, Your Honor. I would just start  
6 with I think the primary case which we cited, the McDaniel  
7 case, which talks about the fact that the whole premise behind  
8 the hearsay rule is that out-of-court declarations are not --  
9 are not inherently trustworthy, and the real test for that is  
10 cross examining, and it talks about it here as when somebody  
11 tries to get their own self-exculpating statements in through  
12 this rule. It's not allowed specifically because it's an end  
13 run around the test of cross examination. We've heard some  
14 talk here about the why that some of these statements would not  
15 be offered for the truth of the matter asserted, and I think as  
16 the Court has pointed out, they are not relevant then.

17 So just to take a typical example that everybody has  
18 been using these guys sitting around the campfire, whatever, a  
19 few months before the nighttime surveillance saying something  
20 like, I'm not down for kidnapping. So if they said that it has  
21 no independent relevance. The fact that it was said doesn't  
22 mean anything other than the truth of the matter asserted.  
23 They are asking the jury to believe that they didn't intend to  
24 go kidnap her at the time. So if it is for the truth of the  
25 matter asserted then it's hearsay and it has to fall within a

1 specific exception. I think the main one we have been talking  
2 about here is the state of mind or present sense impression.

3 I think present sense impression we can dismiss pretty  
4 quickly. That's for something like I'm cold, oh, I am not  
5 hungry, like, I'm not guilty or I don't intend to commit a  
6 crime. That's a state of preference, a statement of  
7 preference.

8 As far as state of mind, I think the case that's  
9 really instructive on this is the Duka case, which I briefed.  
10 It's almost exactly like our case here, and as the Duka case  
11 pointed out, allowing people to import their own  
12 self-exculpating statements in through the state of mind  
13 exception would devour the hearsay rule. It just basically  
14 completely does away with the ability to cross examine  
15 somebody. In that case you had something very similar, where  
16 you had a terrorism Defendant who said to somebody who turned  
17 out to be an informant that he thought Jihad was impractical in  
18 the United States at the time, which is pretty much like these  
19 statements that we are hearing here. I don't want to snatch  
20 and grab politicians or that that's a bad idea. You have the  
21 same kind of circumstances going on where in Duka the person  
22 was afraid that they may be talking to FBI informants, and in  
23 this case you have the same thing. We would need to be able to  
24 cross examine the declarant with facts like the fact that they  
25 constantly changed encrypted apps specifically like Mr. Harris

1 told them to change to an encrypted app that would allow them  
2 to delete everything if the FBI got a hold of it. They  
3 constantly talked about they got together to make sure they  
4 showed each other's ID to make sure nobody was an FBI  
5 informant. The Defense tries to distinguish it in one of their  
6 briefs by saying, no, it's different here because they actually  
7 trusted the CHS Dan. But I'd point out their own pleadings  
8 belied that whole argument. They actually plead in R383 at  
9 page ID 2571, they have been raising recently that they are  
10 claiming it's FBI misconduct. That they told Dan that if you  
11 are accused they should -- that he should deny that he is an  
12 FBI informant and accuse somebody else because Dan was being  
13 accused of being an FBI informant just like everybody else was.

14 Now, my point isn't to argue this whole thing here.  
15 We would do that at trial. My point is these are all things  
16 that we would have to be able to cross examine the declarant  
17 about for the jury to get that real sense as to whether that's  
18 a reliable statement. So any one of these Defendants, if they  
19 could just smuggle in the statement which could not be tested  
20 months before the nighttime surveillance that, oh, I wasn't  
21 down for kidnapping, doesn't allow us to confront them with it  
22 with the jury watching their demeanor like the Court has  
23 pointed out is important.

24 When they answer questions like, well, isn't it true  
25 that you thought you were talking to an FBI informant because

1 of these things or isn't it true that you changed your mind  
2 four months later when we see you saying that you want to find  
3 the Governor's house or you are sitting in front of her house  
4 with a night vision scope at night? They would need to see  
5 that person's reaction to that to judge whether or not they --  
6 their state of mind was truly what they are saying it was.

7 THE COURT: All right. So focus on the, I think it's  
8 line 68 to 70, that a couple of lawyers have pointed out, the  
9 Harris statements about, you know, no snatch and grab reaction  
10 to, you know, they want to kidnap politicians, no, shut up, we  
11 are no Frank Butler -- or Butler wasn't said out loud. And I  
12 hear what you are saying. As I said in my opening comments, I  
13 am inclined to agree with you that a lot of that depends on  
14 truth, and if it does, it may not fit comfortably in any of  
15 those exceptions, and yet, you know, the Defense theory, if I  
16 understand it, it's multilayered, but one is there never was a  
17 kidnapping plot other than in the minds of some Government  
18 agents and their confidential human sources. And you know, at  
19 the end of the process maybe some of these people were in the  
20 car or on the way to meet Red or were in the car for  
21 surveillance or not. But why isn't it germane and why isn't it  
22 at least on the surface of things a statement of their  
23 intention maybe to say when kidnapping is coming up, you know,  
24 no, I mean, forcefully no. Don't snatch and grab. We are not  
25 going to do that. And how does the -- you are saying what, the

1       only way the jury gets to hear that is if Harris takes the  
2       stand and gets subject to cross examination?

3               MR. KESSLER: Yeah. That's exactly what I'm saying,  
4       Your Honor. I don't disagree at all that it by itself is  
5       germane, and I understand why they want to put it in. So  
6       that's not really the question. We are not saying that it  
7       doesn't prove anything about their intent. What I'm saying is  
8       that there is a way for them to do it, which is they have to  
9       testify so that the jury can actually judge their credibility  
10      as to whether they meant it as to whether they were saying it  
11      for some other reason like because they were afraid about who  
12      they were talking to or whether they changed their mind later.

13             THE COURT: All right. So I pushed the Defense on if  
14      you stretch 803(3) too far on state of mind you get the  
15      truckload of hearsay, and like the Duka case talks about on the  
16      other hand, what does come in then? 803(3) is an exception  
17      that allows statements that would otherwise be hearsay to come  
18      in for truth in certain occasions, and why isn't that a  
19      statement without prompting immediate reaction to they want to  
20      kidnap politicians? No snatch and grab. Maybe you have an  
21      explanation for it that removes the exculpatory nature of the  
22      statement, but doesn't 803(3) provide that narrow pathway for  
23      at least some statements? In other words, how do I make 803(3)  
24      real without reading it out of the code?

25             MR. KESSLER: Well, I think it has -- it can't be

1 going to the ultimate issue, which is, you know, it's one thing  
2 for somebody to say what typically comes in under state of  
3 mind, something like somebody saying, you know, I'm headed to  
4 California, as evidence that they later are going to go to  
5 California. But for somebody to basically go right to the  
6 ultimate issue and basically say, I lacked the intent to commit  
7 this crime, that's not really the kind of thing that is  
8 supposed to get smuggled in here. It's the ultimate issue.

9 THE COURT: All right. I mean, I guess, you know, I  
10 don't see them saying that directly. It is exculpatory in the  
11 sense that it's an expression that this individual at least at  
12 that time is expressing words about, you know, not being down  
13 for it or not being in on what the Government says was the main  
14 point of the conspiracy. But I am not sure there is a case  
15 that says, you know, just because it embraces an issue  
16 ultimately for the jury that you don't get to put the statement  
17 in under 803(3).

18 MR. KESSLER: I do think the case that really  
19 addresses it the best is Duka, where it says there has to be no  
20 suspicious circumstance to suggest a motive to misrepresent  
21 their state of mind, and I think the jury needs to hear them  
22 answer those questions on cross examination that isn't it true  
23 that you thought you were sitting around the campfire or  
24 whatever with people who might be Government informants?

25 THE COURT: All right. Let me move onto the other big



1 issue in the briefing on this chart, the statements that are  
2 attributed to informants or confidential human sources and the  
3 statements that are attributed to the agents, and to me they  
4 fall into somewhat of a different bucket.

5 I think the argument to admit statements from the FBI  
6 agents as a party admission is a stronger one than the one to  
7 admit the confidential human source statements as a party  
8 admission. I know Branom is a case that's out there for the  
9 circumstance. I know the Defense relies heavily on it. It  
10 certainly stands for the proposition that, you know, you can't  
11 automatically exclude the statements of an informant, and that  
12 in fact, at least in the case where the Government admitted  
13 that was a possibility, you could bring it in. But I have to  
14 say informants all have their own agendas and strike me much  
15 more as independent contractors, which in the civil side, you  
16 know, who never come in under a party admission. They have a  
17 contractor. They have their own agenda, and if they break it  
18 they may be in breach of contract but they are not saying  
19 something that can fairly bind a party to them. They are  
20 contracted.

21 On the other hand, an officer of a company for sure  
22 acting within the scope of what the officer is doing for the  
23 company would ordinarily have party admission, and you know,  
24 the statements of an FBI agent who is running the  
25 organization's approach to this, if it's otherwise relevant,

1 would seem to be something that the Government might be fairly  
2 called to account for. And I think I'll start with Mr. Kessler  
3 on this.

4 I know your position, if I understand the briefing  
5 right, is really neither category should come in as a party  
6 admission, not the statement of an FBI agent or confidential  
7 human source, but then you also touched in some of your  
8 briefing on, well, some of the statements aren't relevant  
9 anyway, but let me start with you and on the agents themselves.  
10 Why shouldn't the Government have to account for what, not  
11 every FBI agent is saying, but what the FBI agent charged with  
12 this investigation is actually saying in the course of the  
13 investigation?

14 MR. KESSLER: Well, first off, it falls under the  
15 hearsay -- the definition of hearsay because it is an  
16 explanation of how of court declarant --

17 THE COURT: Unless it's a statement of a party  
18 opponent. Then it's not hearsay.

19 MR. KESSLER: Right. And I am not necessarily arguing  
20 with whether they are an agent at this point, but just to take  
21 the FBI agents, and I know we are mixing up terms of art when  
22 we talk about agency in terms of Rule 801, but that -- what the  
23 agent says to the CHS really isn't relevant.

24 THE COURT: Well, that's a different question. I am  
25 talking about the hearsay issue first. It may or may not be

1 relevant, but why shouldn't the Government be, you know,  
2 obliged to account for it as a statement of the Government  
3 that -- the plaintiff in the case?

4 MR. KESSLER: I mean, I guess that's a different  
5 question. Even --

6 THE COURT: That's the starting question.

7 MR. KESSLER: Right.

8 THE COURT: The Defense says under Branom it's not  
9 just the FBI agent. It's also the CHSs that come in. The  
10 Government is accountable because it's a party admission. And  
11 relevance is another question. And I just want to tease out  
12 whether you agree or disagree that the statements attributed to  
13 the FBI agents here, you know, fall within the party admission  
14 definition or not?

15 MR. KESSLER: So speaking only of the FBI agents  
16 themselves, I think our position would be that is a much closer  
17 case to say that they are agents of the Government because they  
18 actually work for the Government, but those statements aren't  
19 relevant, and the reason I say they aren't relevant is what an  
20 FBI agent says to a confidential informant in the field can't  
21 by itself actually influence the Defendants to do anything. I  
22 mean, just to take a wild hypothetical, even if you assumed  
23 that an FBI agent said to a CHS directly, I want you to entrap  
24 Mr. Fox and I'll give you a million if you do it, that doesn't  
25 actually induce Mr. Fox to do anything because he doesn't know

1 about that. It's only what the informant actually said to him  
2 or did with him that's relevant, not the actual motive of the  
3 agent behind it, and the case on that is Makhoulta,  
4 M-a-k-h-l-o-u-t-a. It spells out pretty succinctly that the  
5 FBI's agent's motivation is not relevant. So yeah, to answer  
6 your questions as to hearsay, Your Honor, I think that's a  
7 closer call than with the informants. You want me to hit the  
8 informants now?

9 THE COURT: Yes, please.

10 MR. KESSLER: With the informants I think that's a  
11 much bigger stretch to say they are an agent of the Government.  
12 I understand what Branom says there, but a lot of the other  
13 cases the Defendants have cited are cases that are totally  
14 distinguishable where it's something like, for example, an AUSA  
15 going into court --

16 THE COURT: Stick with Branom, because after all, I am  
17 bound by the Sixth Circuit and that's a Sixth Circuit case.

18 MR. KESSLER: Right. I think the big distinction with  
19 Branom -- first, you are really talking about two particular  
20 informants, and I think it's worth separating those two. The  
21 first one is CHS Dan, who is going to testify. So I don't  
22 think it's really an issue with Dan at all. The ones that they  
23 really want to get in are the ones for Steve Robeson, which  
24 from their own pleadings we can see they are concerned that he  
25 either won't show up to testify or he'll take the fifth or

1 something like that. I think that one is totally  
2 distinguishable from Branom because Branom premised the idea  
3 that the informant's statements come in on Rule 801(d)(2)(D),  
4 which says that the statements have to be within the scope of  
5 the agency relationship.

6 Now, the Defendants have undermined that argument  
7 themselves in a later pleading, ECF 399 at page ID 2785, and  
8 that's not the only time they do it, where they throw out an  
9 internal report saying that the FBI had commented that  
10 Mr. Robeson was doing too much talking and not enough  
11 listening, and he wasn't following their directions. So it's  
12 really impossible to bind the United States with the statements  
13 of somebody like Steve Robeson who they actually were saying  
14 internally wasn't following directions. He wasn't doing his  
15 master's bidding in any sense.

16 And as the Court is going to hear at the trial,  
17 Mr. Robeson actually was on their side all along. Actually  
18 tried to get another informant to destroy evidence. Tried to  
19 tell them that the boogaloo was still on after the arrests had  
20 gone down. So clearly he wasn't on the United State's team.  
21 He wasn't following the master's direction. So there is no way  
22 the United States should be held responsible for his statements  
23 as the statements of a trusted agent.

24 THE COURT: All right. Thank you. Let me go to the  
25 Defense on these issues. I'll just take the same order until

1 the Defense tells me they want to go in a different one and  
2 we'll start with Mr. Gibbons.

3 MR. GIBBONS: Thank you, Your Honor.

4 With respect to the agency theory with respect to the  
5 CHSs I'll predominantly hit on that.

6 CHS Dan, CHS Steve were tightly controlled by the FBI  
7 at all times. I have in front of me, and we attached a summary  
8 of Agent Chamber's supervisory work over CHS Dan. I think we  
9 attached that in a response brief to issues involving Agent  
10 Chambers. He had contact with CHS Dan daily, often times  
11 multiple times a day as evidenced by the 1023s that he  
12 submitted, and the 1023s he documents the statements of CHS  
13 Dan. He documents the statements that CHS Dan relates that he  
14 has heard the Defendants make and others in detail. So --

15 THE COURT: Let me interrupt you a second. I did  
16 interrupt you, Mr. Kessler, to say you don't really object to  
17 what is on the chart coming in as to CHS Dan if it comes in in  
18 the context of his witness examination?

19 MR. KESSLER: It would still have -- you know, the  
20 regular hearsay rules are still going to apply. They can ask  
21 him about those things, but they can just sit here and say, for  
22 example, during the Defense case in chief sit down with a tape  
23 recorder and play all these things Dan said. I think they can  
24 ask him whether he said it, and then if he denies it they could  
25 play it, for example, as a, you know, as a prior inconsistent

1 statement.

2 THE COURT: Okay. And going to you, Mr. Gibbons, if  
3 you are allowed to use the statements attributed to CHS Dan in  
4 cross examining his direct testimony, does that get you where  
5 you want to be or are you asking for the ability to do sort of  
6 a substantive presentation and reading of it in your own case  
7 in chief as well?

8 MR. GIBBONS: I think we would also want to use the  
9 statements in and of themselves.

10 THE COURT: Go ahead and finish what you were going to  
11 say on CHS Dan.

12 MR. GIBBONS: With respect to Dan, also, as Your Honor  
13 is aware, there are screen shots that CHS Dan had contact with  
14 his handling agent, Special Agent Impola and Chambers.  
15 Mr. Kessler had indicated that the activities or the statements  
16 of the agents that are handling the CHS are not relevant  
17 because their mindset doesn't have anything to do with what may  
18 have been going on with Adam Fox. I wish that were true.

19 The agents were giving CHS Dan specific instruction  
20 and giving him guidance and giving him things to do. One of  
21 those screen shots references the goals that the agents had for  
22 CHS Dan in terms of prompting him to talk to Adam about making  
23 maps, prompting him to contact Adam about the CHS, CHS Dan  
24 seeking direction at one point on a screen shot asking Agent  
25 Chambers how many ride-alongs do you want? So -- and that's

1        responded to. He is given specific direction.

2                And looking at the jury instruction for entrapment and  
3        predisposition, the jury instruction clearly reflects the  
4        Branom decision and the idea that the Government acts through  
5        its agents. In paragraph 4 of the entrapment instruction the  
6        indication here to the jury would be that it is sometimes  
7        necessary for an investigation -- during the investigation for  
8        a Government agent to pretend to be a criminal and to offer to  
9        take part in a crime. And ultimately the question in a  
10        entrapment case is whether the Government persuaded a Defendant  
11        who is not already willing to commit a crime to go ahead and  
12        commit it. And the way that would happen, if it did happen, if  
13        the Defense were successful, it would have to happen through  
14        the CHSs. They are the tools of the special agents. They do  
15        what they tell them to do. In this case we do know that the  
16        FBI was aware of CHS Steve and his activities as we have  
17        indicated in our reply brief as of August 9th. That's in the  
18        middle of this investigation. That August 9th phone call makes  
19        it clear that CHS Steve and his activities were disclosed and  
20        known to the FBI, and they were known to CHS Dan, who took  
21        those activities forward and touted those to Adam Fox.

22                CHS Steve, as far as I am aware -- who is not  
23        admonished or otherwise disciplined until after the conclusion  
24        of the case when the Government decided, hey, CHS Steve creates  
25        problems for us on an entrapment analysis. We need to do



1 something about it. CHS Steve started and invited people to  
2 national militia meetings, this three percent patriot militia  
3 that he told everyone he was the president of and the president  
4 of the national board. He invited them to Dublin and Peebles,  
5 Ohio. He invited the individuals in this case and others to  
6 Cambria, Wisconsin, for training. All of this is documented  
7 extensively in FBI reporting, real time reporting. All of  
8 these events are recorded.

9 THE COURT: What I really want to get focus on,  
10 though, from all the parties, is not so much on what their  
11 arguments are going to be about the case generally, but the  
12 evidentiary issues of what does that mean, if anything, for the  
13 statements of these individuals that can come in despite the  
14 hearsay rule or under an exception or as a party admission.  
15 That's really what I want to get focused on.

16 MR. GIBBONS: I think what it means to me from an  
17 evidentiary standpoint, Your Honor, is Steve Robeson is an  
18 agent of the Government and the agent is responsible for the  
19 statements and his activity, and with respect to the  
20 evidentiary rule at issue, 801(d)(2)(D), Steve Robeson  
21 qualifies as an agent of the Government, and I think his  
22 statements come in as standalone statements because they are  
23 not hearsay as defined by the rule.

24 THE COURT: Okay. And Branom would be your lead case  
25 on that I take it?

1 MR. GIBBONS: Branom would be the lead case on that,  
2 Your Honor. And if you take a step out of the circuit for sake  
3 of argument and look at districts where the Branom case doesn't  
4 necessarily carry the day, I think the distinction is in those  
5 cases they have found and relied in saying that the CHS isn't  
6 of a sufficient quality or quantity to establish agency. They  
7 call it a tenuous relationship, and I think the point of what I  
8 have been trying to make sure is that the relationships between  
9 the FBI handling agents and these CHSs is anything but tenuous.  
10 These CHSs had an intimate knowledge of the broader case, their  
11 position within the investigation and what their roles were.  
12 They had specific defined roles. So these aren't like most CHS  
13 cases. And most entrapment cases involve drugs, and the idea  
14 is that the informant goes into a house and buys drugs for  
15 somebody who he has already bought drugs from. It's just not  
16 complicated. It's very simple. And maybe that person says  
17 something and their relationship with the Government at that  
18 point is tenuous. That's not the case here. These people have  
19 signed agreements. They have been admonished. They have  
20 received significant cash payments from the Government for  
21 their participation. As they move along they get progress  
22 payments apparently. So all of that, I think, brings them  
23 clearly within the agency ambit and allows for their statements  
24 to be excluded definitively as hearsay and they should be  
25 allowed to be admitted.

1 THE COURT: All right. Thank you.

2 Mr. Blanchard, we'll go to you next and ask you again  
3 to speak slowly.

4 MR. BLANCHARD: So I just have one point I want to  
5 make and then I'll defer to Mr. Graham on the balance. He did  
6 the heavy lifting on the briefing here.

7 I think on the confidential human source issue, the  
8 thing that makes the sources the agents in my view is the level  
9 of monitoring, knowledge and the ratification of their actions  
10 by the FBI agents. By way of example, CHS Steve was working as  
11 a confidential human source. The way that Mr. Croft became  
12 involved with this group is that with the knowledge of the FBI  
13 CHS Steve went back east, invited my client on a vacation with  
14 his family. The FBI knew that he was going to do that, told  
15 him not to do that, found out that he violated the rules, and  
16 then kept using him. I don't think the FBI can employ people  
17 that they know are off the reservation, ratify that behavior,  
18 and then step away from it by claiming they are unreliable and  
19 not agents.

20 I think it would be a different animal if this was a  
21 one off agent, went off the reservation, snitch went off the  
22 reservation and did something. But here the Government was  
23 fully aware of all of their actions. Continued to use them.  
24 It paid to try to benefit from them and now they are trying to  
25 run from their misconduct, and so I think because of how

1       closely they were involved and how closely the agents monitored  
2       and what they knew, I think that weighs in favor of finding  
3       that they are admissions of party opponents. And I would defer  
4       to Mr. Graham for the balance of the argument on the Headley  
5       case because he did the heavy lifting on the briefing.

6               THE COURT: All right. Thank you, Mr. Blanchard.

7               We'll go to Mr. Graham next.

8               MR. GRAHAM: Your Honor, you posed the question before  
9       about what was the authority the Defense relied on. Of course,  
10      part of that is Branom, that decision affirmed by the Sixth  
11      Circuit in Reid, and the other point I would make is when the  
12      out of circuit courts talk about what happened in the Sixth  
13      Circuit in Branom and Reid, they specifically recognize that  
14      the Sixth Circuit has taken a different position than they  
15      would take. Okay. Well, whether they are right or not, as the  
16      Court has already noted, it's the Sixth Circuit law that  
17      controls, so Branom, Reid, and then the distinction described  
18      by the other courts.

19              The thing that I think makes the CHS issue here very  
20      different than most is this. We know how the control over --  
21      we'll just use CHS Dan. The control by the FBI was so great  
22      over CHS Dan that on one occasion we know of they sat with him,  
23      and as he talked with Adam Fox, and they whispered in his ear  
24      what he should say to Fox. That is an undisputed point.

25              So this is not a matter of someone being out in the

1 field such as CHS Dan doing what he thought maybe he should do  
2 in coming back and reporting. This is a matter of explicit  
3 direction, and that's probably the best example. How often --

4 THE COURT: Do you really think it's that unusual?  
5 I've had a lot of cases where agents have been in contact with  
6 the person that they are using in the field to monitor a  
7 conversation in real time. Drug cases that happens a lot.

8 MR. GRAHAM: Well, if, in fact, an agent in a drug  
9 case sat with an informant and whispered, you know, set up a  
10 kilo, set up 10 kilos, whatever it may be, the question --  
11 whether that's unusual or not, the question is, then, is the  
12 informant acting independently or not? And I'd say whether  
13 it's a drug case or not they are not acting independently.  
14 They are acting at the explicit direction and so they become an  
15 agent.

16 THE COURT: All right.

17 MR. GRAHAM: At page 18 of our briefing, in ECF 383,  
18 we talk about some of the explicit direction that the FBI gives  
19 CHS Dan telling him to, you know, put a brain to certain  
20 things, who to make suggestions to. And then, of course, you  
21 have heard reference already to the question of the FBI coming  
22 up with a plan to help Dan convince others he wasn't an  
23 informant. But again, that's page 18 of ECF 383 where we've  
24 kind of already briefed the best that we can pull out of the  
25 statements to date. So in light of the specific facts of this

1 case apply to Branom, Reid and the contrary position, I think  
2 the CHSs are, in fact, agents here.

3 On the question of relevance, well, that may be a  
4 different matter, but as the Court has noted, if we don't get  
5 over -- from the Defense perspective if we don't get over the  
6 first hurdle the rest of it doesn't really matter. So those  
7 would be my thoughts. Thank you.

8 THE COURT: All right. Let me cut back to Mr. Kessler  
9 a minute on this point of control. I don't know if anybody  
10 else has seen the movie The Truman Show. Anybody seen the  
11 Truman show? That's a Jim Carey movie, and you know, the basic  
12 setup is Jim Carey's character, Truman, from his infancy on is  
13 basically planted in this artificial community that the  
14 producer, who is somewhat godlike in the role, is monitoring,  
15 and Truman is growing up thinking he is having a normal life  
16 but he is really just this character in a massive advertisement  
17 campaign. It's a fun movie that's an interesting movie as  
18 well, and there is a section at the end where Truman is  
19 starting to break out where you start to see the producer  
20 speaking directly to, you know, the other actors unbeknownst to  
21 Truman. He just thinks they are friends, the other actors.  
22 And it's almost literal word for word the producer is laying  
23 out the words. They are then spoken through this other actor  
24 to Truman.

25 Why shouldn't the Government have to account for that

1 in this case if, in fact, the agent is telling the confidential  
2 human source exactly what to say almost to script? Why  
3 wouldn't -- and I know the Truman show isn't authority, but why  
4 isn't that a case where effectively it's a cat's paw? The  
5 Government agent may not be saying the words but he might as  
6 well because the confidential human source is just repeating  
7 them.

8 MR. KESSLER: Well, let's split that into two things  
9 then, Your Honor.

10 THE COURT: All right.

11 MR. KESSLER: So first, if you are talking about a  
12 scenario where the agent is actually, as in your Truman show  
13 example, taking a CHS, whispering in their ear and saying, now  
14 say this to Truman or now say this to Mr. Fox, that's  
15 different. In that scenario I would say the -- you ask should  
16 the Government not be able to be held to account for that? My  
17 argument would be that this isn't the way. There is a way for  
18 them to do that through the rules of evidence, which is call  
19 that FBI agent as a Defense witness and ask them about it. You  
20 don't get it in by just playing hearsay that's not within any  
21 exception. That's just not the way to do it. So there is a  
22 way for them to get that in and inform the jury if they want  
23 to. They just have to do it the way that the rules  
24 contemplate, which is call the witness and ask him the  
25 questions.

1 THE COURT: So which witness would you say the Defense  
2 has to call here?

3 MR. KESSLER: If they want to call, for example, an  
4 FBI agent who handled one of the informants to say, isn't it  
5 true that you said, you know, to CHS Steve or CHS Dan that you  
6 should go do this? They can call that agent to the stand and  
7 ask them questions about it.

8 THE COURT: All right.

9 MR. KESSLER: Now, to take the other side of it, I  
10 would point out that the vast majority of the things that they  
11 have identified are nothing close to being somebody sitting  
12 there whispering in the ear. They are trying to say that CHS  
13 Steve, for example, is not independent because they check up on  
14 him from time to time. But that's completely false, as is the  
15 idea that he was removed as a Government informant because he  
16 was problematic in an entrapment scenario. He was removed as a  
17 Government informant when the Government found out he was  
18 playing both sides. This whole idea that the Government should  
19 be held accountable for his statements as an agent speaking on  
20 behalf of the Government, they are saying it's because he had  
21 intimate knowledge of the investigation. That's entirely not  
22 true because the reason he got caught is because he didn't know  
23 who the other confidential informants were.

24 We have been talking about CHS Dan. The reason CHS  
25 Steve got caught was he told CHS Dan to destroy the evidence of



1 Kaleb Franks and Ty Garbin driving around with his friend Steve  
2 Higgins in a car looking for the Governor's house. So it's  
3 kind of hard to imagine how he was acting within the scope of  
4 his employment as a Government agent when he tells another  
5 Government CHS, thinking he is also a bad guy, that he should  
6 destroy evidence of the crime.

7 They also point out the fact that he received  
8 admonishments from the FBI agents -- CHS Steve received  
9 admonishments as a way of showing that he had control. That  
10 doesn't show he had control. That shows that he wasn't under  
11 their control because he was admonished not to commit any  
12 crimes, and as the Court is aware, he was prosecuted for  
13 continuing to buy and sell firearms when he was prohibited from  
14 doing so as a felon, and he just pled guilty to a 10-year  
15 federal felony because he deviated from their admonishments.

16 They also are trying to say that the Government  
17 continually ratified everything that he did. There was not  
18 ratification. That's prosecution. When he committed a crime  
19 he was removed as a Government informant and prosecuted.

20 So my whole point isn't so much -- I know they have  
21 tried to apply this and say, well, you can't just disown this  
22 guy because he was unreliable. The point isn't that he was  
23 unreliable. The point is that Branom is explicitly  
24 conditioned, calling somebody an agent of the Government for  
25 the purposes of the party opponent exception requires, under

1 801(d) (1) (D), that they be acting within the scope of their  
2 employment. Now, maybe somebody who has got an agent  
3 whispering in their ear, say this, who then repeats it, is  
4 acting within the scope of their employment, but somebody who  
5 is a maverick like this who is breaking the rules and doing  
6 whatever they want to do against Government instructions is not  
7 acting within the scope of their employment. That's the  
8 distinction from Branom.

9 THE COURT: All right. Thank you.

10 And I'll go back to Mr. Graham in case you'd like to  
11 respond to that.

12 MR. GRAHAM: I would, Your Honor. A couple of points  
13 I would make.

14 THE COURT: Go ahead.

15 MR. GRAHAM: No. 1, I think if we are going to  
16 distinguish CHS Dan from CHS Steve, let me go back to Dan.  
17 Certainly we know was under closer control not only what I've  
18 already mentioned but receiving messages from agents such as  
19 the mission is to kill the Governor specifically. I mean,  
20 explicit instructions that he would act on.

21 Shifting over to CHS Steve, I don't want to move to  
22 any other issues, but it bleeds over into a discovery issue.  
23 The Government talks about what it did in regard to CHS Steve.  
24 We, of course, have asked for his informant file so we can  
25 verify and investigate. The Government has refused to turn

1       that over. What they are saying about Steve may or may not be  
2       accurate. I don't know. But certainly I don't think the Court  
3       should make a ruling based upon things that are offered about  
4       Steve without having us -- without giving us a chance to  
5       verify. So again, in regard to Dan, I think it's just clearly  
6       as can be.

7               In regard to Steve, we are a little bit in the dark  
8       because we haven't been given the information about him. So  
9       that would be my response. Thank you.

10              THE COURT: All right.

11              MR. KESSLER: Your Honor --

12              THE COURT: I know the Government wants to respond to  
13       the screen shot point which is a potentially inflammatory item,  
14       so go ahead. We'll give the Government a chance to put its  
15       position on that.

16              MR. KESSLER: Yes, Your Honor.

17              And I'll keep it relatively brief here, but I think  
18       that counsel is misleading the Court here and knows it because  
19       we have raised this before and litigated it. The Court has  
20       seen that screen shot and they put it in there as evidence. I  
21       think they say that Special Agent Chambers is acting as a  
22       Government agent directing the Government's plan, and they say  
23       specifically directing a Government informant to kill the  
24       Governor. That's not just that it's inflammatory. It is  
25       completely misleading. As we pointed out in a previous

1 briefing answering this they cut out the very next line which  
2 shows that there is a question. The question is, the mission  
3 is to kidnap -- is to kill the Governor specifically? And the  
4 answer to that question is, that's on the first call, i.e., use  
5 of drones or any means. So this is Agent Chambers asking the  
6 informant for information about what the mission is, and he's  
7 answering the question.

8 And as further proof that they have this completely  
9 wrong and they know it, that call -- I went back and checked  
10 what that call was, and it says, that's on the first call use  
11 of drones or any means. I have it cued up and can play it for  
12 the Court if you want. But the confidential informant Dan is  
13 talking to a person by the name of Frank Butler in another  
14 state in Virginia about Frank Butler's plan to set fire to the  
15 house of the Governor of Virginia. They don't even have the  
16 right Governor here, Your Honor. So this whole idea that  
17 Special Agent Chambers of the FBI is specifically directing  
18 Dan -- CHS Dan to tell these Defendants to kill Governor  
19 Whitmer is completely misleading. They have the wrong state,  
20 the wrong governor, the wrong informant. None of this is  
21 correct, Your Honor, and it's inflammatory.

22 THE COURT: All right. You want to respond for the  
23 Defense, Mr. Graham?

24 MR. GRAHAM: Your Honor, I think that it's clear that  
25 the statement is sent from --

1 THE COURT: You got to keep the microphone close.

2 MR. GRAHAM: Sorry. The statement is sent from  
3 Chambers to Dan. We can argue about what the meaning is at  
4 trial. My point was simply the level of control from Chambers  
5 to Dan is very clear and it just adds to that. That's all I  
6 would say.

7 THE COURT: All right. Let's go to Ms. Kelly, then,  
8 on the evidentiary issue.

9 MS. KELLY: Thank you, Your Honor. I'll join with my  
10 colleagues and try to keep my comments brief.

11 I appreciate Mr. Kessler in giving this Court some  
12 more background information about who my client was saying he  
13 was distancing himself from and Frank Butler.

14 I agree that the agency is so tightly wound in this  
15 case that the CHSs should be government actors and are  
16 government actors. The recording that Mr. Graham spoke of  
17 that's on line item 57 that's on August the 9th where the group  
18 has met as we've talked about, Mr. Harris makes certain  
19 statements about no snatch and grab. And this is an effort and  
20 this is the reason why it's different than a typical drug case.

21 THE COURT: Can you remind me of the line item again?  
22 I'm sorry.

23 MS. KELLY: Yes, 57.

24 THE COURT: Thank you. Go ahead.

25 MS. KELLY: The agency -- that the group is divided.

1 That no one is joining a conspiracy, and the agents have CHS  
2 Dan come in. There is whispering. They direct him what to say  
3 to try to commit some sort of property crime involving a boat  
4 because maybe Ty and Daniel Harris would be more apt to go  
5 after a softer target. Again, some sort of property crime  
6 involving a boat. So you have the agents whispering directly  
7 to CHS Dan who is whispering it or saying it to Adam Fox, and  
8 that's the conversation. So that's the close agency that they  
9 have with CHS Dan.

10 With respect to CHS Steve, for the Government to use  
11 CHS Steve to pull people in to go to meetings or trainings or  
12 different places and then to stand in front of this Court and  
13 say, well, he wasn't on the U.S.'s team so we can't present  
14 those statements, certainly CHS Steve was not playing both  
15 sides on the Government's position for over a year. I think he  
16 was involved back in 2019, and to now say that he was not on  
17 the U.S.'s team seems completely contradictory.

18 The other issues that CHS Steve has is the 501c(3), is  
19 the fake, forged 501c(3) that they are going to offer to these  
20 gentlemen here in order to have free money. CHS Dan is also  
21 repeating that to these gentlemen. No one takes either of them  
22 up on a free credit card to purchase ammunition, but the  
23 Government knows that CHS Steve is using this fake, fraudulent  
24 forged 501c(3), and that's continuing through CHS Dan. So --  
25 and the statements there are riddled with 501c(3) statements

1 throughout the Defense exhibits. So I think it does show that  
2 these are agents of the Government. They shouldn't now not  
3 be -- they shouldn't be able to now say, well, we don't like  
4 some of the things he was doing even though we knew about it  
5 and say he wasn't on the U.S. team so we can't be attributed to  
6 these comments.

7 Thank you, Your Honor.

8 THE COURT: Thank you.

9 Mr. Hills?

10 MR. HILLS: I guess I'll just pick up on where  
11 Ms. Kelly left off. I think that CHS Dan and CHS Steve are  
12 intertwined, and the Government, if they see that CHS Steve  
13 didn't know that CHS Dan was kind of an undercover agent, well,  
14 it certainly appears that CHS Dan knew about CHS Steve because  
15 I'm again referring back to the August 23rd Lake Orion meeting  
16 and the statement.

17 THE COURT: Try to slow down a little. Go ahead.

18 MR. HILLS: On page 8, I believe it's line 23 or item  
19 No. 23. Leading up to this particular statement I'd like the  
20 Court to look at, my client, Mr. Caserta, was pushing back on  
21 this 501c(3) item, and I think -- I can't remember -- either  
22 Harris or Franks was pushing back on that, and then CHS Dan  
23 goes into vouching for CHS Dan and indicating that this 501 was  
24 under a charity event. It is a quick way to crowd fund. And  
25 I'll speak for Mr. Caserta who doesn't have any money. Like,

1       they are here and he is talking about we can get \$5,000 to  
2       purchase NIVEs. I can't remember what the acronym is, but  
3       night vision equipment that's very expensive. And I think this  
4       is important to show that CHS Dan, who, I mean, had had daily  
5       contact with that, multiple times a day contact with Special  
6       Agent Chambers and Special Agent Impola, was in his own way  
7       coordinating and vouching for CHS Steve who was promoting this  
8       fake 501c(3) to get these guys enticed to purchase equipment  
9       and to believe in CHS Steve, who CHS Steve hosted the Wisconsin  
10      event wherein CHS Dan through I assume the FBI went to in a big  
11      suburban, paid for the gas, drove my client and several others  
12      all the way from Michigan to Cambria, Wisconsin, to have these  
13      XTFs hosted by CHS Steve and come all the way back for -- I  
14      can't speak to the others, but my client, who didn't have any  
15      money, he couldn't really afford to do something like that.  
16      And then CHS Steve comes back to Luther, the Luther event in  
17      September, and is helping coordinate this ride-along to gather  
18      up as many people as possible to go on this ride-along to see  
19      the Governor's place.

20               So they are deeply intertwined, Your Honor, and involved  
21      with their handlers. And CHS Steve -- I wasn't the one that  
22      briefed it, but he I think had at least four quarterly  
23      check-ins from October 2019 to October 2020 with the FBI as a  
24      CHS. He was deeply intertwined with the FBI.

25               Thank you.



1           THE COURT: All right. Thank you. We have been going  
2           about an hour and-a-half, and I'd like to shift to a different  
3           evidentiary issue that the parties have briefed. The  
4           Government's motion was 369, your motion regarding what they  
5           call improper impeachment. I think the Defendants all  
6           responded to that in one form or another, and it really covers,  
7           you know, multiple issues, including whether one of the agents,  
8           I think it was Impola, had another -- or Chambers rather, had  
9           another business he was trying to promote, things regarding a  
10          domestic violence charge, and I think eventual conviction  
11          involving Agent Trask and statements that one of them may have  
12          made to a public outlet about the politics of the past  
13          president. I think there was one other issue as well, but what  
14          I'd like to do is get the parties to just summarize their  
15          positions on it. At least as I read, it didn't seem like the  
16          Defense was necessarily planning to pursue the domestic  
17          violence issue regarding Trask, but I might be wrong about  
18          that, but let me go to, Mr. Kessler is the moving party on it,  
19          and get the Government's summary first.

20          MR. KESSLER: Yes, Your Honor. And that was basically  
21          a good summary of it.

22          It's really a two-part thing. It's first we are  
23          moving under Rule 403 to exclude evidence that has a  
24          substantial danger of confusing the issues or misleading the  
25          jury. As the Court said in the Roberts case, evidence that is

1 intended to convince the jury to acquit on an improper basis  
2 should be excluded under 403, and I think that the Court has  
3 seen it in all the pleadings here. And what they are  
4 apparently trying to put on at trial to try to convince a jury  
5 not to weigh this case based on whether the Government has  
6 proved the Defendants were conspiring to kidnap, but on the  
7 alternative and improper basis of whether or not they approve  
8 of the way the FBI has handled things. And they have tried to  
9 call the entire U.S. justice system into question through the  
10 press, and this evidence would be imported into -- into the  
11 trial for that same purpose, to try to convince the jury to  
12 punish the FBI or punish the federal government rather than  
13 weigh the facts.

14 I don't know if the Court is aware of it, but over the  
15 weekend Mr. Croft in some recorded phone calls in calling into  
16 a podcast admitted that that's what he was trying to do, and I  
17 have those calls. All three of them are less than 30 seconds  
18 if the Court would indulge me, Your Honor.

19 THE COURT: We've got enough materials in the briefing  
20 already that I don't think we need to introduce something new.  
21 If the parties feel like there needs to be more added, you  
22 know, that's one thing, but Mr. Croft is just one of the  
23 Defendants and the others are here, too.

24 MR. KESSLER: I can very briefly summarize, then, Your  
25 Honor. Basically what he was saying is he is not going to get

1 a fair shake from this Court, from you. I don't know if you've  
2 seen it, Your Honor. He's called for your impeachment. And  
3 it's been picked up by the Detroit News. They have been  
4 constantly alleging FBI misconduct which has been picked up by  
5 BuzzFeed, particularly a reporter by the name of Jessica  
6 Garrison.

7 THE COURT: Let me cut you off. I don't want either  
8 side to spend a lot of time making statements that will get  
9 picked up in the press. I want to hear the evidentiary  
10 argument. It's, of course, a given that you can't, either  
11 table, introduce things that would create unfair surprise when  
12 measured against probative value. On the other hand, it's not  
13 unfair for a Defendant in a general way to challenge the  
14 integrity of the investigation. That's often a strategy.

15 So what about these particular evidentiary points, the  
16 domestic violence conviction and charge for one of the agents,  
17 statements about the past president, the other business,  
18 Exeintel I think it is, and a alleged perjury? Let's focus on  
19 that's because that's really the decision point framed by the  
20 motion.

21 MR. KESSLER: Yes, Your Honor.

22 I'll take those one at a time, and maybe they weren't  
23 going to raise it but the one, this Agent Trask. There just  
24 isn't any other -- and I challenge them to come up with any  
25 relevant reason to put in the fact that Agent Trask pled guilty

1 recently to assaulting his wife. What that possibly would add  
2 to the relevance under 401, how it possibly would make that  
3 more likely that they did or did not conspire to kidnap the  
4 Governor is beyond me.

5 As far as whether he had put out opinions on social  
6 media that he didn't like former President Trump, again,  
7 totally irrelevant. I mean, if it were true and that's the  
8 allegation, how a particular agent felt about the president has  
9 absolutely nothing to do with whether these Defendants here  
10 were entrapped by anybody or whether they formed a meeting of  
11 the minds to commit the crime. I don't think the Trask ones  
12 make any sense at all but I'll leave it to them to address  
13 those.

14 The other ones, they have repeatedly brought up the  
15 issue of Special Agent Chambers having a side job as they call  
16 it with this Exeintel company. There is -- there were no facts  
17 on that other than the fact that he -- which is uncontested,  
18 that he tried to start a business, didn't make any money off of  
19 it, but they have raised all kinds of innuendo about which is  
20 completely unsupported that somehow this entire investigation  
21 was started up so that Agent Chambers could make money off of  
22 it through predicting it through Exeintel. That may be their  
23 theory, but it's -- again, and I think Judge Berens brought it  
24 up in our last hearing. This is nothing but a BuzzFeed article  
25 that they've been feeding to them to support that. There just

1 isn't any evidence of that and there isn't any reason to get  
2 into that other than to try to inflame people on the jury.  
3 Again, you know, FBI doesn't like Trump or this person was  
4 breaking rules about not having a second job or trying to get a  
5 second job or whatever, there just isn't any real evidence of  
6 relevance there.

7 And I think the same thing goes for the allegations  
8 they are making against Special Agent Impola. That's even more  
9 far afield because it has nothing to do with this case. The  
10 allegation that they keep throwing out there is that another  
11 defense attorney in another case made some allegations of  
12 perjury against Agent Impola, and there has been no resolution  
13 of that in any forum. The judge didn't make a finding that he  
14 had perjured himself or anything like that. So at most all  
15 that gives them is the ability, if Agent Impola were to testify  
16 as a Government witness, a good faith basis for asking him  
17 about it. That's all it is.

18 But what they want to do, again, as with Trask and as  
19 with Agent Chambers, is just throw out these things to put it  
20 together with this narrative that's been in the news, that for  
21 example, the people who assaulted the Capitol were just  
22 patriots who were being purged or that somehow they were on the  
23 right side of the law here and appealing to the jury to make  
24 their decision based on something like politics or what cable  
25 news channel they watch as opposed to deciding it based on the

1 evidence they hear in court. That's why it should be kept out  
2 under 403, Your Honor.

3 The second part of the motion really is just related  
4 in that we are asking the Court not to allow them to call any  
5 of those agents -- if they have some other reason to call them,  
6 that's fine, but not for the purpose of putting them up there  
7 on the stand so that they can import this improper impeachment  
8 material in.

9 THE COURT: All right. Thank you.

10 So let's go to the Defense position on these issues  
11 and I'll go in the same order. Mr. Gibbons?

12 MR. GIBBONS: Thank you, Your Honor.

13 Mr. Blanchard framed the response so I will defer to  
14 him in large part to speak to some of the details, but I would  
15 just say offhand with respect to Agent Trask, I would agree  
16 that the aggravated assault conviction misdemeanor, I don't  
17 think that has anything to do with anything if Mr. Trask were  
18 to be here at trial. I do have an issue with respect to the  
19 Facebook posts in that I don't know what they are. So the  
20 Government has filed a motion to preclude us from making  
21 reference to Mr. Trask's Facebook posts. The only reference I  
22 have to Facebook posts were furnished to me by the U.S.  
23 Attorney's Office who received an inquiry with a selection of  
24 some posts, which I think the Court is aware.

25 Now, one of those posts, however, is not about Donald

1 Trump per se, but rather it's about poor white people with guns  
2 in Lansing demonstrating for the right to get a haircut or  
3 something along those lines. Some of the Defendants in this  
4 case were at that demonstration involving the Owosso barber.  
5 That would be a direct reference to our clients I would think,  
6 but I don't know that because I really just have TV 8's version  
7 of what Mr. Trask's Facebook posts were. It seems to me that  
8 the Government -- I asked the Government for their agent's  
9 Facebook posts and I was told that that would not be made  
10 available to me.

11 MR. KESSLER: For the record, we don't have that  
12 either. That's why we said we are not turning it over. We are  
13 not hiding it.

14 THE COURT: Go ahead.

15 MR. GIBBONS: I think there is some DOJ regulations or  
16 suggestions of best practices that require that they should  
17 step forward and secure that material if it's -- I mean --

18 MR. KESSLER: That's wrong.

19 THE COURT: Don't talk over each other. All right.  
20 You know, you have been respectful. It's been a long sit. I  
21 get that. Let people state their positions and we'll deal with  
22 the response. Go ahead, Mr. Gibbons.

23 MR. GIBBONS: The U.S. Attorney is responsible for the  
24 FBI agents, they are agents for the Government, for information  
25 they know or don't know. They have an independent obligation

1 to go find the information when it comes to their attention and  
2 to avoid spoliation. We have not been able to find a way to  
3 recover Mr. Trask's Facebook posts. So I am just making the  
4 point, Your Honor, I don't know exactly what it is that they  
5 wish to exclude so it's difficult for me to form an opinion on  
6 it, and the same would be true with respect to --

7 THE COURT: Well, I guess it would be difficult for  
8 you to be a proponent of anything you don't have either, right?

9 MR. GIBBONS: Yes, it would, Your Honor.

10 THE COURT: Let's go onto something you do have a  
11 chance to be a proponent of.

12 MR. GIBBONS: And the same thing with Agent Impola. I  
13 don't know what happened in this complaint. I do know it was  
14 made. That is somewhat, I guess, a matter of public record.  
15 What the resolution is, I don't know. It might be helpful if  
16 the Government let us know. I mean, obviously, if he were  
17 cleared of any type of perjury charge internally,  
18 administratively or otherwise, it would certainly put a short  
19 end to the matter in my opinion, but I don't know. The  
20 Government has refused to tell us if there is an outcome and if  
21 there was what that outcome is.

22 And with respect to Mr. Kessler's assertion that the  
23 only thing that exists out there with regard to Exeintel is  
24 unsubstantiated material contained in a BuzzFeed article, we  
25 did attach a business proposal that Agent Chambers prepared and



1 sent in an attempt to money advertise or otherwise expand his  
2 business opportunity. We have -- Exhibit B is another e-mail  
3 that we were able to obtain, and we have his resume as Exhibit  
4 C. And Exhibit D we do have a certificate of dissolution, and  
5 I think as well as the articles of incorporation for the LLC I  
6 think have already been provided to the Court. So there is  
7 something other than just a BuzzFeed article with respect to  
8 these matters.

9 I will defer to Mr. Blanchard for the balance of my  
10 presentation, but I did want to make a point that I think there  
11 is a little more to this than just unsubstantiated allegations  
12 found in a newspaper.

13 THE COURT: All right. So Mr. Blanchard, we'll give  
14 you a chance to proceed, and I know speaking slow might be  
15 tough if you are the main presenter on these issues, but do  
16 your best because I want to make sure I can understand you.

17 MR. BLANCHARD: I think I made it clear in my brief I  
18 don't see how the aggravated assault, while very disturbing, is  
19 relevant to what we are trying here. The Facebook post for  
20 Mr. Trask I don't know. Like the Court said, it's hard to be a  
21 proponent of something one doesn't have. I have concerns about  
22 whether there is a Brady and Giglio issue in the offing, but I  
23 understand that is the Government's burden to comply with at  
24 this point.

25 Regarding Agent Impola and the perjury allegations,

1       which the Government refers to in passing as unfounded, the  
2       issue could be resolved if the Court would ask the Government  
3       to tell us what happened today, because I think if he was  
4       cleared it becomes a very easy issue for everyone.

5               In any case, I think the Rule 608(b) permits us to  
6       inquire a specific consensus of conduct which would bear on  
7       truthfulness, and I think a prior incidence of perjury would  
8       bear on truthfulness. Now, there are limitations, and we may  
9       be stuck with the answers, and we may have to approach it  
10      carefully, but I think there is good reason to believe that he  
11      testified untruthfully in front of Judge Neff, and so I think  
12      it's something that we can inquire into when he testifies  
13      whether the Government calls him or we do.

14             Turning to Mr. Chambers, I think it's important to  
15      understand from the beginning Mr. Chambers played a very large  
16      role in this investigation. He was the primary handler for the  
17      Government's star witness. He prepared 227 different reports  
18      regarding the actions of their star CHS, and we learned that he  
19      incorporated an LLC in New Mexico in 2019. That LLC is  
20      Exeintel. And we learned through our own investigation that in  
21      the late fall of 2019, Mr. Chambers was pitching this new  
22      business to individuals in Michigan and elsewhere to provide  
23      sort of a private side version of what he does for the FBI  
24      intelligence services. One of those contracts we attached as  
25      an exhibit included a bid of up to six million dollars that he

1 hoped to earn from it. And I think why it's important is  
2 because at the same time he is sending around his resume to  
3 these potential purchasers, and the resume touts the other  
4 cases including the Musa case, which was pending in front of  
5 this court at the time that Agent Chambers was touting his  
6 involvement in it. He was effectively telling people, I did  
7 really good work on this case. You should hire me. This was a  
8 case that had not yet been resolved. I think very clearly in  
9 Musa he had a financial motive to make sure Musa was convicted  
10 because he was bragging about his involvement.

11 It is not much of a stretch to believe that if he did  
12 this in November of 2019, he was still doing it in the spring  
13 of 2020 when he targeted our clients. That we don't have the  
14 e-mails, that we haven't found the people he pitched to in  
15 2020, doesn't make it inadmissible.

16 I think it's also very telling that the Government,  
17 when they say he never made any money and he chose to get out  
18 of this business, they didn't provide any timeline for that.  
19 We then found out that Agent Chambers dissolved Exeintel in  
20 October of 2021. So he didn't move to get out of this business  
21 until after it became public that he had this inappropriate  
22 business.

23 There is no question that Agent Chambers created  
24 Exeintel. There is no question that Agent Chambers was trying  
25 to make money in the months leading up to our clients being

1       targeted. There is no question that he used his other  
2       investigations to try and sell his services and make money, and  
3       so I think it's reasonable to conclude that it happened here.  
4       I don't think the Government can run from their agent's  
5       misconduct by announcing that they no longer intend to call the  
6       case agent because he has done bad things and they send out  
7       agents to do interviews to try and clean it up. I think we are  
8       entitled to attack the good faith of the investigation. I  
9       think -- I think that's a legitimate defense, and we are  
10      allowed to put in front of the jury evidence that would cause  
11      them to consider the motives of the agents and whether they  
12      were acting in bad faith when they went out and engaged  
13      confidential sources to entrap our clients.

14               I also -- the Government makes a significant argument  
15      about he never actually earned any money, and I don't think  
16      that earning money matters at all. That Agent Chambers was no  
17      good at the business he was trying to start doesn't bear at all  
18      to the expectancy. He very clearly had an enormous expectancy  
19      when he sent out a bid for six million dollars, and so I think  
20      what his motivations were is what matters, not what he actually  
21      got out of it, and so for those reasons I think that the  
22      Chambers' issues are fair game. I think the Impola issue is  
23      fair game subject to the limitations that we may be stuck with  
24      his answer, and I think the Trask DV charge probably doesn't  
25      come in.

1 THE COURT: All right. Thank you.

2 We'll go to Mr. Graham.

3 MR. GRAHAM: Nothing to add, Your Honor.

4 THE COURT: All right. Ms. Kelly?

5 MS. KELLY: Thank you, Your Honor.

6 I will again join with my colleagues, and just to add  
7 onto what Mr. Blanchard was saying, in scenario two on page 8  
8 of 12 on our exhibits Mr. Chambers specifically is highlighting  
9 that he is involved in terrorism related events, so he is  
10 specifically highlighting that he is very good at investigating  
11 terrorist related events. And as Mr. Blanchard put in our  
12 brief, it's his pervasive narrative that continues throughout  
13 this case, throughout this investigation where he is pushing,  
14 where he is trumping up things to make it look in a certain  
15 way, which is not in an effort, the Defense believes, to sell  
16 his business. And to give the Court a very quick example,  
17 Agent Chambers writes a 1023 on October the 4th, and he talks  
18 about that some of the Defendants are going to bring money for  
19 a good faith payment for explosives, knowing full well that  
20 none of the Defendants were told that they were going to be  
21 getting explosives, which is clear from the text messages, but  
22 that good faith payment for explosives makes it into the  
23 superseding indictment, paragraph 19, so it's taken directly  
24 from Agent Chambers to the superseding indictment.

25 So this pervasive narrative that he is trying to sell

1 his company for terrorist related events makes it into a  
2 superseding indictment, and again, I think it's in an effort to  
3 sell his business. He talks about -- as early as May 31st when  
4 CHS Dan is complaining that these gentlemen here before this  
5 Court are wasting his time because they are not wanting to  
6 engage in any violent activity, Agent Chambers is talking  
7 about, well, people feel safe because we are here. So again,  
8 he is talking in the community about this investigation, about  
9 his involvement. He is out there trying to sell his business  
10 in an active manner, and with that I would defer to the Court.

11 THE COURT: All right. Mr. Hills?

12 MR. HILLS: Thank you.

13 I would also concur in everybody's arguments here, and  
14 I would also just -- I'd like to reemphasize that in the fall  
15 of 2019, when Special Agent Chambers failed to obtain his  
16 contract, he did not right then dissolve Exeintel and then this  
17 case came about and fell in his lap, and again, he was the  
18 special agent, along with Impola, involved with the main CHS  
19 Dan throughout the whole thing. And I would add another 1023  
20 that Chambers authored that would have misled other people, and  
21 that's regarding the Lake Orion meeting on 8-23, 2020, wherein  
22 the Court can read the excerpts regarding what was said, and in  
23 the 1023 that Chambers authored he indicates that the group  
24 agreed with Adam Fox's position, which is not what happened.

25 So I would just add that, Your Honor, and thank you.

1 THE COURT: All right. Mr. Kessler, there was one  
2 response you wanted to make that -- something that Mr. Gibbons  
3 stated. So I'll give you a chance to complete the record from  
4 your perspective.

5 MR. KESSLER: I was just disagreeing with their  
6 reading some internal DOJ policy that we have to go out and  
7 find information like that for them, and I apologize for  
8 talking over Mr. Gibbons.

9 THE COURT: All right.

10 MR. KESSLER: If I could mention one thing, Your  
11 Honor? I do think that Ms. Kelly and Mr. Blanchard just made  
12 my point when they focused extensively on this allegation that  
13 Agent Chambers was trying to sell his business. They are  
14 making the point that they want to make this trial about Agent  
15 Chambers. And the fact that he might have looked for a job or  
16 put some other case on his resume, those things aren't related  
17 to whether or not and they don't make it any more or less  
18 likely that these Defendants conspired to commit kidnapping,  
19 which proves my point. The only reason to import this into the  
20 case is to mislead the jury, which is what's prohibited by 403,  
21 Your Honor.

22 THE COURT: All right. Let me just check with  
23 Mr. Brandell a minute. We have been going two hours. Are you  
24 able to go maybe another 15 to 20 minutes?

25 COURT REPORTER: Yes, Your Honor.

1                   Let's go to the 404(b) issue, predisposition issue.  
2                   The Government has offered a number of things that it says it  
3                   would want to admit on predisposition if that's in the case  
4                   regarding Mr. Croft, Mr. Franks in particular, and some  
5                   criminal behavior in the case of Mr. Croft that goes back quite  
6                   a while and for which he was eventually pardoned. And in the  
7                   case of Mr. Franks, which I think is the other situation, the  
8                   Defense position is, you know, that was while he was still an  
9                   addict and he recovered from that and it's not close enough to  
10                  the kinds of activity here to fit within the fair use or  
11                  predisposition.

12                 So why don't we do this. Mr. Kessler, if you want to  
13                 briefly summarize what you would intend to use on the 404(b) I  
14                 think it's your motion at 370, and then we'll get the Defense  
15                 response. Again, both sides briefed it pretty thoroughly but  
16                 I'd like to get a summation at this point.

17                 MR. KESSLER: Yes, Your Honor.

18                 Yeah. Basically, as we brought up earlier, I would  
19                 concede that if we weren't talking about entrapment that these  
20                 things would probably not come in. But if they are going to  
21                 put entrapment in as their Defense, then predisposition is  
22                 directly at issue, and as the Sixth Circuit held in the Nelson  
23                 case, the character or reputation of the Defendant is the No. 1  
24                 factor for the jury to consider as to whether the person was  
25                 predisposed.



1            Their own case that they cite repeatedly, the McLernon  
2            case, actually said the court was able to find entrapment as a  
3            matter of law in that case because the Government presented no  
4            evidence of the character or reputation of the Defendant, and  
5            that's what these things are, Your Honor. I would have to  
6            disagree with the Defense in their briefing that these crimes  
7            are too dissimilar, because as the Court is well aware from all  
8            the pleadings and from the indictment, the plot was to break  
9            into the Governor's house and snatch her, and they were going  
10           to do it with guns. They trained for it with guns.

11           Mr. Croft has a conviction for burglary. I know he's  
12           raised issues about how that might be different, but the issue  
13           isn't that it's like a typical 404(b) case where we are just  
14           trying to say, well, the guy did a crime just like this before  
15           so he's likely to do it again. Basically, when he says he's  
16           being entrapped he's basically saying, I am the kind of  
17           innocent person who would not have been misled into doing  
18           something like this, but in fact, it is similar. Burglary and  
19           going into somebody's home is exactly what he is being charged  
20           with intending to do in this case.

21           Same thing with his prior conviction for shooting at  
22           somebody, the felony firearms conviction. Again, he quibbles  
23           about whether the person deserved to be shot at, which he is  
24           probably going to argue Governor Whitmer deserved to be  
25           kidnapped, but he quibbles about that and whether it was over

1       quarters or whether it was over his sister or whatever it was.  
2       The issue isn't whether the crime was exactly similar. It's is  
3       he the kind of guy who would shoot at somebody? And he pled  
4       guilty to doing that in the past. He did shoot at somebody,  
5       and that's uncontested. So he is going to sit here and say, I  
6       am the kind of innocent guy who would never be involved in  
7       something like this but for the Government pushing it so hard.  
8       That's just not true, and we are entitled to push back on it.

9               THE COURT: So the timing is the other obvious issue.  
10       It's so long ago, and it was at a time when he was, I think, a  
11       teenager barely out of his teens if he was, and he is now a  
12       much older man and he doesn't have anything that the Government  
13       is proffering of like kind between then. In fact, he's got a  
14       pardon. And I don't think that's automatically disqualified  
15       for 404(b), but that's pretty long even when you look at some  
16       of your better cases.

17              MR. KESSLER: I acknowledge that, Your Honor, with  
18       Mr. Croft it is a long time ago and think that should factor  
19       into the Court's decision. I don't deny that.

20              As to Mr. Franks, it's a little different.

21              THE COURT: Any more you want to say on Croft?  
22       Otherwise, let's go to Franks.

23              MR. KESSLER: Just as to the pardon, Your Honor. The  
24       fact that he was pardoned I think shouldn't make any  
25       difference. People routinely use 404(b) evidence of crimes

1 where people have been acquitted, and this is much more  
2 telling. It's something where he was convicted. He pled  
3 guilty, and the Governor of Delaware can't waive a magic wand  
4 and change his character. They might be able to change whether  
5 his civil rights can be restored, but they can't change the  
6 evidence of character.

7 THE COURT: All right. On Franks?

8 MR. KESSLER: On Mr. Franks, Your Honor, again, it is  
9 similar. He's got two things that we would want to introduce.  
10 First, there is the home invasion, which is, again, is similar  
11 to what they have alleged to be accused of being -- wanting to  
12 do in this case. But then there is also the very recent, as a  
13 matter of fact, it was going on at the same time as this, crime  
14 of manufacturing illegal weapons to sell to a known drug  
15 dealer. And I know one of the Defendants, I believe it was  
16 Mr. Harris, took issue with whether the guns were actually made  
17 or whether it was a drug dealer, but I attached to our briefing  
18 a transcript of them talking about it, and Mr. Franks and  
19 Mr. Harris specifically talked about that the intent was to  
20 sell the guns to a drug dealer that Mr. Franks had done time  
21 with because they knew that he couldn't possess a weapon. He  
22 couldn't buy one legally, and that they could charge him three  
23 times as much. I think the willingness to do that -- and as  
24 you can tell from the transcript they actually went to the  
25 person's house. Very similar to what they did in this case,

1 where they did a surveillance to scope out the route that they  
2 would take. You can see it from the transcript. They did the  
3 same thing. And actually, Ty Garbin was with them and will  
4 testify about it, that they went to the house of the felon that  
5 they were going to sell the gun to and they looked for the ways  
6 to go in there and the way -- the place to park and which  
7 direction to park and how they could get away quickly if things  
8 went sideways.

9 And those guns were manufactured. Two of them were  
10 finished and were seized from Ty Garbin's house. He will  
11 testify about that. One of them was not finished because it  
12 was actually given to CHS Dan who was instructed not to finish  
13 it and give them an AR-15. So they did everything that they  
14 were accused of there. I will be able to establish that for  
15 Rule 104 purposes no problem, Your Honor. I think that is  
16 highly probative of whether or not he is the kind of person who  
17 has the character who would do something like this, was  
18 predisposed.

19 THE COURT: All right. And those were the three main  
20 items, right?

21 MR. KESSLER: Yes, Your Honor.

22 THE COURT: The Croft criminal history, the Franks  
23 criminal history, and then the Franks and Harris guns?

24 MR. KESSLER: Yes, Your Honor.

25 THE COURT: Let's go over to the Defense. Your

1 client, Mr. Gibbons, isn't directly implicated in this. Do you  
2 have any position you want to articulate?

3 MR. GIBBONS: I take no position, Your Honor. It does  
4 not affect my client.

5 THE COURT: Mr. Blanchard?

6 MR. BLANCHARD: Calling the first conviction of  
7 burglary I would say is a gross mischaracterization of what  
8 actually happened. From the police reports it appears that  
9 Mr. Croft's involvement was driving some folks who stole some  
10 quarters from a laundry machine. That's not similar in any way  
11 to the allegations here, and it's something that is alleged to  
12 have been done in --

13 THE COURT: Let me ask you to get back on the slow  
14 wagon. I know it's hard, but we were hearing you talk and I  
15 think you were mentioning age as opposed to -- not being the  
16 same kind of activity stealing quarters from a coin laundry in  
17 a building, and then when he was 19, if I heard you correctly.  
18 But just clarify that so we have a clean record if you would.

19 MR. BLANCHARD: Yes. So it's not sufficiently similar  
20 because the conduct is just wildly different. Obviously, this  
21 is stuff that is -- that occurred when he was around the age of  
22 19 and a few years later on the other event, and it's not  
23 temporally close enough to be helpful to the jury.

24 I also think the Court needs to consider the fact that  
25 the pardon is some evidence that he has been rehabilitated

1 during intervening times. I don't think that the pardon  
2 probably necessarily precludes abuse of evidence in a case like  
3 this, but I think the passage of time and the pardon is some  
4 evidence that it shouldn't be used.

5 Similarly, on the other event which the Government  
6 called a drive-by shooting, it was actually Mr. Croft parked in  
7 front of his girlfriend's house and his girlfriend's brother  
8 came out to confront him. During an argument he fired a round  
9 in the direction of that person. That is not anything like the  
10 allegation here. It's not a drive-by shooting. It's 25 years  
11 ago, and there is an intervening pardon. For those reasons I  
12 don't think that either of those events should come in with an  
13 attempt to show predisposition.

14 THE COURT: All right. Thank you.

15 Mr. Graham?

16 MR. GRAHAM: Your Honor, in regard to -- obviously  
17 there are two instances involved here. In regard to the first  
18 one relating to the home invasion, the crime is that, in fact,  
19 Mr. Franks, when he was a drug addict, when he was actively a  
20 drug addict broke into his step-uncle's house and took his  
21 piggy bank or his change jar or whatever it was. That's the  
22 crime. He also does not have a conviction at this time for the  
23 crime because the case was dismissed under the Holmes Youthful  
24 Trainee Act, demonstrating that he showed to the Court that, in  
25 fact, he deserved to have the charge dismissed.

1                   Now, Your Honor, I would note that Mr. Franks, at the  
2                   time of his arrest, was working for the same court as a  
3                   counselor, if you will, for people who had drug cases. So his  
4                   rehabilitation from what led to the piggy bank robbery or  
5                   burglary is we think complete at this point. It doesn't prove  
6                   anything, and it's -- there is no evidence whatsoever that  
7                   Mr. Franks was not completely clean of any drug use. Again, he  
8                   worked for a hospital as a rehab assistant and counselor. He  
9                   worked for the Court. So the thing that triggered what  
10                  happened in 2013, even though that charge was dismissed,  
11                  ultimately is no longer the case.

12                 In regard to what is alleged to be a ghost gun or a  
13                 partially manufactured firearm, again, I don't see how that is  
14                 probative at all of the alleged conspiracy. If the Government  
15                 wants to prove that there was a plan to manufacture and sell a  
16                 partially manufactured firearm that's turned into a completed  
17                 firearm, all that does is -- all that does is throw mud at  
18                 Mr. Franks without proving anything, and as a result we think  
19                 that neither instance should be used. If, in fact, the Court  
20                 gave any consideration to allowing the Government to introduce  
21                 the partially manufactured firearm incident, I ask the Court to  
22                 rule that there be no reference to the fact that Mr. Franks  
23                 knew the alleged buyer from having, as the Government says,  
24                 done time. So that's a small little kind of segment of that,  
25                 but that would be my request of the Court. Thank you.

1 THE COURT: All right. Let's go to Ms. Kelly. Again,  
2 your client is implicated at least on the ghost gun piece of  
3 it.

4 MS. KELLY: Yes, Your Honor.

5 I was provided by the government that if Mr. Harris  
6 does claim entrapment it would be introducing two items, two  
7 other acts. One is a sawing off the barrel of his 12-gauge  
8 shotgun as well as the personally manufactured firearms or  
9 ghost guns.

10 I have briefed the issue with respect to the sawing  
11 off the shotgun. The Government attached a photograph, and --  
12 between Mr. Harris and Mr. Garbin. The reports from the FBI  
13 say that the shotgun was not seized. It was shortened to an  
14 unknown length. So for this Court the first step is to see if  
15 there is sufficient evidence that a jury can conclude that the  
16 other act actually happened and that Mr. Harris was the one  
17 that committed it. I have not seen any other report that it  
18 was seized as proffered in the Government's position. I am  
19 still working through discovery, so it may be in there. I am  
20 not sure.

21 With -- even if this Court finds that there is  
22 sufficient evidence for the sawing off or shortening a barrel  
23 on a shotgun, certainly that's not substantially similar to  
24 trying to kidnap the Governor. This incident allegedly took  
25 place on August the 14th, 2020. There is no evidence or no



1 proffer from the Government that Mr. Harris was going to use  
2 this gun in any kind of conspiracy to kidnap the governor.  
3 There is no evidence that he brought that shotgun to Luther,  
4 which is the property here in the Western District of Michigan.  
5 So I don't think that that evidence should come in for  
6 propensity.

7 With respect to the ghost guns or the personally  
8 manufactured firearms, I join with Mr. Graham that those  
9 incidents are not substantially similar. It appears that the  
10 Government wants to use that evidence to corroborate other  
11 expected testimony that Mr. Harris was left behind on the night  
12 sponsored drive by the Government by happenstance. So because  
13 he went on a drive a week after September the 12th, and was  
14 looking at someone's house, they want to use that to show that  
15 he was left behind by mistake, not because he opposed looking  
16 at her house. So I think that is an improper purpose under  
17 this -- under 404 and 403, not substantially similar incidents.  
18 We would ask the Court to exclude them.

19 THE COURT: All right. Let me just ask you, and I  
20 should have asked Mr. Graham this as well on the similarity  
21 issue. I know Mr. Blanchard mentioned it, too, but  
22 particularly on the ghost gun issue or even the sawed off  
23 barrel of a shotgun, assuming there is enough evidence under  
24 104 to get those in, you know, 404(b), we are also used to  
25 dealing with similarity. Was it close enough, which is

1 typically key? And it's partly what is involved here, but if  
2 we are talking about the predisposition for entrapment, you  
3 know, in the words of the Sixth Circuit, quote, the key  
4 question in determining predisposition is whether law  
5 enforcement planted a criminal design in the mind of an  
6 otherwise law-abiding citizen or whether the Government merely  
7 provided an opportunity to commit a crime to one who was  
8 already predisposed to do so, end quote. And you can find  
9 other similar language. And I guess what I wonder, if  
10 predisposition is in the case, whether there is evidence of  
11 other criminal activity almost of any kind, but certainly of a  
12 kind that would involve firearms would seem to be fair bearing  
13 on that issue. How do you -- I mean, even if it isn't exactly  
14 the same thing as kidnapping. Do you want to respond to that?

15 MS. KELLY: Your Honor, I believe the case law, as  
16 cited in my brief, it doesn't have to be exactly, but it has to  
17 be substantially similar. The shortening of a barrel on a  
18 shotgun or going on a drive, you know, or dealing in firearms  
19 certainly has no bearing on wanting to kidnap or being involved  
20 with kidnapping of the Governor. So I think those are  
21 dissimilar enough that the Sixth Circuit would find that they  
22 should not be introduced.

23 THE COURT: Let me ask you if there is anything you  
24 want to add on that?

25 MR. GRAHAM: No. I agree with Ms. Kelly and have

1 nothing else to add.

2 THE COURT: All right. Do you have anything you want  
3 to add on that issue, Mr. Hills?

4 MR. HILLS: No, Your Honor. There has been no 404(b)  
5 lodged against my client.

6 THE COURT: Do you have something you want to respond  
7 to, Mr. Kessler?

8 MR. KESSLER: Just very briefly. The one thing I just  
9 don't want to be overlooked with the sawing off of the shotgun  
10 is that it's very similar to a crime that only Mr. Harris is  
11 charged with, which is not the kidnapping. He is also charged  
12 with having a short-barreled rifle. So this under 404(b), even  
13 if predisposition were not an issue, it would clearly be  
14 admissible to show that he had the intent to have a  
15 short-barreled rifle. It's the same offense. It's a  
16 short-barreled shotgun, and the actual length of it isn't as  
17 important.

18 THE COURT: Let me interrupt you a second because that  
19 introduces a whole different layer of complexity that we  
20 haven't talked about. It's one thing to say we are pleading  
21 entrapment on the Count 1 conspiracy. I am not sure anybody is  
22 pleading entrapment, for example, on the charge that you just  
23 made, and you know, that's a different question. If not,  
24 predisposition isn't in on that issue, and you know, then some  
25 similarity is much more important and 404(b) might allow that,

1 but also the prejudice weighing is different.

2 MR. KESSLER: Right.

3 THE COURT: Because the scope is -- I mean, it's a  
4 tighter scope of inquiry.

5 MR. KESSLER: Yes, Your Honor, and I think it's  
6 admissible maybe under a different rubric for each of those  
7 things. What's important with regard to it coming in as to  
8 predisposition, it's not so much the length of the shotgun  
9 but -- and we attached this to the pleading. As you can see,  
10 he took pictures of them sawing it off and was talking with Ty  
11 Garbin about it, and the caption that's attached to that is  
12 something from a cartoon called Beavis and Butt-head, and the  
13 quote is, break the law, while they were sawing off the  
14 shotgun. So the fact that they are laughing about breaking the  
15 law while doing this, that goes to the predisposition angle for  
16 the case in general if they claim entrapment.

17 But then I think it's a different question if you are  
18 talking about just regular straight up 404(b) with regard to  
19 the sawed off shotgun was demonstrating intent with regard to  
20 the short-barreled rifle that he later had. I think that's  
21 just your traditional 404(b) analysis. I think it comes in  
22 under both, but it could come in under either.

23 THE COURT: All right. Well, we've covered a lot of  
24 ground and I appreciate it. The main point in setting the  
25 hearing way back when was to get some parsing and more specific

1 terms on these evidentiary issues that we had generally talked  
2 about at the last hearing, and certainly you have all given me  
3 a lot more information today and in the briefing. You know,  
4 there are a lot of other motions pending, including some  
5 recently filed ones. Don't intend to introduce or entertain  
6 argument on those today. Some I expect to be able to decide on  
7 papers. Some might need to wait until we get to final  
8 pretrial, for example, the recent one on transcripts. I don't  
9 know how I can address that or frankly even the parties until  
10 they see each other's transcripts, but I haven't forgotten  
11 about those, and I will address them, but I don't think I need  
12 any argument on it.

13 Let's just go around the table and give everybody a  
14 minute or two, and I mean that, just a minute or two if there  
15 is something someone didn't get a chance to respond to that you  
16 want to make sure I hear. Let's do that before we break.  
17 Mr. Kessler?

18 MR. KESSLER: This is unrelated but it's a  
19 housekeeping matter that I think --

20 THE COURT: All right. Before we get to housekeeping,  
21 anything else you want to add on these issues?

22 MR. KESSLER: No, Your Honor. Thank you.

23 THE COURT: All right. How about Mr. Gibbons?

24 MR. GIBBONS: Yes, Your Honor.

25 Going all the way back to the beginning, you had asked

1 for specific instances of  
2 the -- of my client's conduct or statements. I wasn't really  
3 necessarily prepared, but in looking now through the binder and  
4 looking through the chart, my client, on August 9th, was asked  
5 by CHS Dan, where do you think the guys are at? This is after  
6 CHS Dan had prompted a discussion about kidnapping earlier in  
7 the day. Adam Fox responds, divided. Definitely divided. So  
8 that is, I think, a present sense impression that would qualify  
9 under the rules regarding what we kind of beat that to death.

10 The other thing that I wanted to state is ultimately  
11 the hearsay rule as indicated in -- the government brought up a  
12 case, McDaniel, indicating that 802, the hearsay rule, is  
13 premised on the theory that out-of-court statements are subject  
14 to particular hazards that the client could be lying. He could  
15 have misperceived the events. The memory could be faulty.  
16 Things of that nature. I think it does bear some relevance in  
17 this case that the statements we are all talking about were  
18 picked up mechanically by a recorder, and so we are not  
19 necessarily in a position where people are saying, well, I  
20 remember somebody said this. We are playing an audiotape of  
21 what somebody actually said. I mean, there is no question --  
22 or there shouldn't be any question in the large measure as to  
23 what words are actually being used and what words are being  
24 referenced from out of court because they are mechanically  
25 captured.

1                   And so I think in -- I think when you move that  
2                   forward, stepping back and trying to see the forest through the  
3                   trees, if the entrapment instruction is at play, I think it  
4                   gives the Court some latitude that we are dealing with  
5                   mechanically captured statements when they are being offered in  
6                   support of entrapment factors of predisposition, and so I think  
7                   I would just leave the Court with that final thought.

8                   THE COURT: All right. Mr. Blanchard?

9                   MR. BLANCHARD: I have nothing to add.

10                  THE COURT: All right. Mr. Graham?

11                  MR. GRAHAM: Nothing to add, Your Honor.

12                  THE COURT: Ms. Kelly?

13                  MS. KELLY: Thank you, Your Honor.

14                         I do have one bit of information, and it involves the  
15                         Government's argument about hearsay statements, and  
16                         specifically about the CHSs. The Government cited to Duka, the  
17                         case, and mentioned that Defendant thought he was already  
18                         talking to a federal informant and so had changed his  
19                         statements. And the Government brought up the fact about dad.  
20                         There are statements in our exhibit where Mr. Harris is  
21                         referring to CHS Dan as dad. That's who he thought he was  
22                         talking to, someone that was trusted. That's quite opposite to  
23                         the Duka case. Just wanted to put that on the record.

24                         THE COURT: All right. Thank you.

25                         Mr. Hills?

1 MR. HILLS: Nothing further. Thank you, Your Honor.

2 THE COURT: All right. Okay. Thank you. You had a  
3 housekeeping matter?

4 MR. KESSLER: Yes, Your Honor. I just thought it  
5 would probably be a good time to do it before we get too close  
6 to the trial. There is the normal issue when we have jury  
7 questionnaires that come out later, the Court normally does not  
8 allow us to share those with anybody. I didn't know if anybody  
9 on the other side was intending to engage jury consultants to  
10 have them analyze those. The same thing with open source  
11 resource on the jurors, whether they can go check, you know,  
12 whether somebody is, you know, putting stuff they've put out  
13 there publically on Google or whatever. I want to make sure we  
14 are all on the same playing field and we don't consider  
15 ourselves bound to not doing something that everybody else on  
16 the other side is doing or vice versa.

17 THE COURT: I don't have any ability, I think, to  
18 police what you may do in public source searching on somebody  
19 who is named in a questionnaire. I can prevent you from doing  
20 it in the courtroom just by not giving you Internet access,  
21 which is what I do, but I am not there to watch what's  
22 happening when you are not here.

23 In terms of sharing it with others, my understanding  
24 is, you know, I don't think anybody has ever had to get  
25 permission to share it with a retained jury consultant, but



1 then, you know, not to get too close to the other agency  
2 issues, I mean, you are responsible for your consultant if you  
3 use one and you got to make sure that a consultant doesn't  
4 misuse them and gets them back to you because we destroy them  
5 after we are all done. But you know, maybe I am missing an  
6 operating procedure that people generally use, but my thought  
7 is if you have a consultant, just like any other expert on your  
8 team, you can use that person or those people. It's got to be  
9 somebody, you know, that you are responsible for. That's my  
10 understanding.

11 MR. KESSLER: Understood, Your Honor. Thank you.

12 THE COURT: Any Defense clarifications on that or is  
13 that the same general understanding you all have?

14 MR. GRAHAM: Yes, Your Honor.

15 THE COURT: All right.

16 MR. HILLS: I would have a question to that  
17 housekeeping realm as well, Your Honor, if I may?

18 THE COURT: Sure.

19 MR. HILLS: How much time are we going to get,  
20 attorneys going to get to address the jury in voir dire?

21 THE COURT: Well, we're way too early for that. We'll  
22 talk about that when we get to final pretrial and we have in  
23 front of us what the actual evidentiary proffers are and where  
24 we're going, whether entrapment is in or not or whether I  
25 haven't decided yet. Those kinds of things will all bear on

1       that. Too early to talk about that.

2               And there is actually another series of trial  
3 management issues. There is a motion for filing for additional  
4 peremptoriness. The transcript issues I already talked about  
5 compelling use immunity. Those things are too early. I am not  
6 ready to deal with those now. Other things?

7               MR. GRAHAM: No, Your Honor.

8               MR. KESSLER: No, Your Honor.

9               THE COURT: Thank you. Thank you for your patience in  
10 getting started. I know it was difficult, and I apologize to  
11 Mr. Caserta especially that you were stuck listening in from  
12 jail. I hope you were all able to hear. And counsel,  
13 Mr. Hills and Mr. Blanchard, thank you for making  
14 accommodations so that we could proceed today. I'll try to get  
15 you decisions on the motions that are ripe as soon as I can so  
16 everybody can start planning going forward.

17               And I think final pretrial is the next official thing  
18 we have scheduled. If when I get into the rest of the motions  
19 and responses I think there needs to be a hearing on another  
20 issue or of course, if counsel thinks there does, you can let  
21 me know that, too. I'll evaluate that, but if we don't get  
22 together before then, we will get together at final pretrial.

23               Hopefully by that time Omicron or whatever other  
24 variant we have will be in serious decline. I would say, you  
25 know, two years ago if you were telling me we'd still be

1 worried about these issues and have numbers on the COVID that  
2 are worse than we had at other times, and frankly, this is the  
3 most disruption we've had in our own schedule just this week,  
4 and I had hearings this afternoon that had to be cancelled on  
5 unrelated matters because either a lawyer or another  
6 participant was positive or exposed, I would never have  
7 believed we'd still be here dealing with it. So thank you for  
8 all bearing with it. Please stay healthy and well to the  
9 extent you can, and we'll see you at least at final pretrial if  
10 we don't need anything before this.

11 LAW CLERK: Court is adjourned.

12 (Proceeding concluded, 1:30 p.m.)  
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## REPORTER'S CERTIFICATE

I, Paul G. Brandell, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of the proceedings had in the within entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/ Paul G. Brandell

Paul G. Brandell, CSR-4552, RPR, CRR

U.S. District Court Reporter

399 Federal Building

Grand Rapids, Michigan 49503